GETTING TO K(NO)W

Annual Report Supplement | 2007-2008

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ABBREVIATIONS

Terms & Titles

AAQC Ambient Air Quality Criteria
AD Anaerobic Digester
ALMR Association of Lighting & Mercury Recyclers
AFA Algonquin Forest Authority
AGO Auditor General of Ontario
AMO Association of Municipalities of Ontario
ANSI Area of Natural and Scientific Interest
APFA Algonquin Park Forestry Agreement
AQI Air Quality Index
ARP Acid Regeneration Plant
AOC Areas of Concern
AOU Area of the Undertaking
C of A Certificate of Approval
CA Conservation Authority
CAT Conservation Action Team
CCME Canadian Council of Ministers of the Environment
CEC Commission for Environmental Cooperation
CELA Canadian Environmental Law Association
CEM Continuous Emissions Monitor
CESD Commissioner of the Environment and Sustainable Development
CHD Canadian Hydro Development Inc.
Class EA Class Environmental Assessment
CLC Citizens Liaison Committee
CLTIP Conservation Land Tax Rebate Program
COA Canada Ontario Agreement Respecting the Great Lakes Basin Ecosystem
CPAWS Canadian Parks and Wilderness Society
CPU Certificate of Property Use
CWS Canada-wide Standard
DFO Department of Fisheries & Oceans (federal)
DO dissolved oxygen
EA Environmental Assessment
EC Environment Canada
ECO Environmental Commissioner of Ontario
EDU Ministry of Education
EEON Environmental Education Ontario
EF Ecological Footprint
EFW Energy From Waste
ENG Ministry of Energy
ENGO Environmental Non-Governmental Organization
EPs Environmental Penalties
EPR Environmental Protection Requirements
ERC Emission Reduction Credit
ERT Environmental Review Tribunal
MNR Ministry of Natural Resources
MOE Ministry of the Environment
MOF Ministry of Finance
MOL Ministry of Labour
MOU Memorandum of Understanding
MPAC Municipal Property Assessment Corporation
MTO Ministry of Transportation
NBI Northern Boreal Initiative
NEC Niagara Escarpment Commission
NEP Niagara Escarpment Plan
NMP Nutrient Management Plan
NMS Nutrient Management Strategy
NOx Nitrogen Oxides
NPRI National Pollutant Release Inventory
NSSA New Source Set Aside
NAAEC North American Agreement on Environmental Cooperation
NSWMA North Simcoe Waste Management Association
OBA Ontario Bar Association
OBS Ontario Biodiversity Strategy
OCA Ontario Court of Appeal
ODT Odour detection threshold
OEB Ontario Energy Board
OEL Occupational Exposure Limit
OMAFRA Ontario Ministry of Agriculture, Food and Rural Affairs
OHS Occupational Health and Safety
OMB Ontario Municipal Board
OFA Ontario Federation of Agriculture
OFA Ontario Forestry Association
OPA Official Plan Amendment
OPA Ontario Power Authority
OPG Ontario Power Generation
ORC Ontario Realty Corporation
O. Reg. Ontario Regulation
ORM Oak Ridges Moraine
ORMCP Oak Ridges Moraine Conservation Plan
ORTEE Ontario Round Table on Environment and Economy
OSSGA Ontario Stone, Sand & Gravel Association
OU Odour unit
OWES Ontario Wetlands Evaluation System Network
PEC Portlands Energy Centre
PET Polyethylene Terephthalate
PGMN Provincial Groundwater Monitoring
PIR Ministry of Public Infrastructure Renewal
PMP Park Management Plan
PMRA Pest Management Regulatory Agency

ESDM Emission Summary and Dispersion Modeling
ESDWGs Education for Sustainable Development Working Groups
ESL Environmentally Sensitive Landscapes
ESR Environmental Study Report
ESWM Ecologically Sustainable Water Management
FMP Forest Management Plan
FMPM Forest Management Planning Manual
FMZ Fisheries Management Zone(s)
FOI Freedom of Information
FRL Forest Resource Licence
FUP Free Use Policy (MNR)
GB Greenbelt
GGH Greater Golden Horseshoe
GHG Greenhouse Gas
GLB Great Lakes Basin
GLWQA Great Lakes Water Quality Agreement
GLSWRA Great Lakes Sustainable Water Resources Agreement
GRCA Grand River Conservation Authority
GTA Greater Toronto Area
GTTA Greater Toronto Transportation Authority
HOV High Occupancy Vehicle
IC&I Industrial, Commercial & Institutional (waste)
IESO Independent Electricity System Operator
IFO Industry Funding Organization
IJC International Joint Commission
IPAT Industrial Pollution Action Team
IPSP Integrated Power System Plan
LaMPs Lakewide Management Plans
LDR Land Disposal Restrictions
LEED Leadership in Energy and Environmental Design
LUP Land Use Permit
MAAP Management of Abandoned Aggregate Properties
MBS Management Board Secretariat
MFTIP Managed Forest Tax Incentive Program
MGS Ministry of Government Services
MHSW Municipal hazardous or special waste
MISA Municipal Industrial Strategy for Abatement
MMAH Ministry of Municipal Affairs and Housing
MNDM Ministry of Northern Development and Mines
POI Point of Impingement
POO Provincial Officer's Order
PPS Provincial Policy Statement
PSW Provincially Significant Wetland
PTTW Permit to Take Water
PWQO Provincial Water Quality Objectives
RAPs Remedial Action Plans
RCA Royal Commission on Matters of Health and Safety Arising from the Use of Asbestos in Ontario
RESOP Renewable Energy Standard Offer Program
RSC Record of Site Condition
SCB Sector Compliance Branch (MOE)
SEV Statement of Environmental Values
SFL Sustainable Forest Licence
SLAPP Strategic Lawsuit Against Public Participation
SMP Soil Management Plan
SO Stewardship Ontario
SO_2 Sulphur Dioxide
SOLRIS Southern Ontario Land Resource Information System
SPA Special Policy Area
STP Sewage Treatment Plant
SWIS Solid Waste Information System
SWMP Storm Water Management Plans
SWP Source Water Protection
TAC Transportation Association of Canada
TOARC The Ontario Aggregate Resources Corporation
ToR Terms of Reference
TSSA Technical Standards and Safety Authority
UCO United Cooperatives of Ontario
UNEP United Nations Environment Programme
US EPA United States Environmental Protection Agency
UTRCA Upper Thames River Conservation Authority
VFSS vegetative filter strip system
WCED World Commission on Environment and Development
WEEE Waste Electrical and Electronic Equipment
WPCP Water Purification Control Plant

Legislation

AFAA *Algonquin Forestry Authority Act*
ANPA *Algonquin National Park Act*
ARA *Aggregate Resources Act*
BSLAA *Brownfield Statute Law Amendment Act*
CAA *Conservation Authorities Act*
CEPA *Canadian Environmental Protection Act*
CFSA *Crown Forest Sustainability Act*
CLA *Conservation Land Act*
CWA *Clean Water Act*
EAA *Environmental Assessment Act*
EBR *Environmental Bill of Rights*
EESLAA *Environmental Enforcement Statute Law Amendment Act*
EPA *Environmental Protection Act*
ERA *Electricity Restructuring Act*
ESA *Endangered Species Act*
FFPPA *Farming and Food Production Protection Act*
FIPPA *Freedom of Information and Protection of Privacy Act*
FWCA *Fish and Wildlife Conservation Act*
GBA *Greenbelt Act*
KHSSPA *Kawartha Highlands Signature Site Parks Act*
LRIA *Lakes and Rivers Improvement Act*
MBCA *Migratory Birds Convention Act (federal)*
NEPDA *Niagara Escarpment Planning and Development Act*
NMA *Nutrient Management Act*
OEBA *Ontario Energy Board Act*
OGSRA *Oil, Gas and Salt Resources Act*
OHSA *Occupational Health and Safety Act*
ORMCA *Oak Ridges Moraine Conservation Act*
OWRA *Ontario Water Resources Act*
PA *Planning Act*
PCLSLAA *Planning And Conservation Land Statute Law Amendment Act, 2006*
PGA *Places to Grow Act*
POA *Provincial Offences Act*
PPA *Provincial Parks Act*
PPCRA *Provincial Parks and Conservation Reserves Act*
RMA *Regulatory Modernization Act*
SDWA *Safe Drinking Water Act*
SSOWA *Safeguarding and Sustaining Ontario's Water Act*
SWSSA *Sustainable Water and Sewage Systems Act*
WDA *Waste Diversion Act*

PREFACE: INTRODUCTION TO THE SUPPLEMENT

Welcome to the Supplement to the Environmental Commissioner of Ontario's 2007-2008 Annual Report. This year's Supplement consists of 11 sections. It addresses the reporting year of April 1, 2007 to March 31, 2008. The following summary provides a short guide to the various sections of the Supplement, and discusses their contents and context within the reporting responsibilities of the Environmental Commissioner of Ontario.

Section 1 – Unposted Decisions

Under the *Environmental Bill of Rights* (*EBR*), prescribed ministries are required to post notices for environmentally significant proposals on the Environmental Registry for public comment. Once a ministry has made a decision on how it will proceed, it must update the proposal notice with a decision notice. When it comes to the attention of the ECO that a ministry subject to the *EBR* has made an environmentally significant decision without first posting a proposal on the Registry, we review that decision and make inquiries to that ministry to determine whether the public's participation rights have been respected. For this reporting period, ten decisions on policies, regulations and instruments were identified as unposted decisions and these are described in this section.

Section 2 – Ministries' Use of Information Notices

Significant differences exist between the requirements ministries must meet for regular proposal notices posted on the Environmental Registry under s. 15, 16, or 22 of the *EBR* and information notices created under section 6 of the *EBR*. When regular proposal notices are posted on the Registry, a ministry is required to consider public comment and post a decision notice explaining the effect of the comments on the ministry's decision. The ministry is also obligated to consider its Statement of Environmental Values in its decision-making. This process is far superior to the posting of an information notice on the Registry, and provides greater public accountability and transparency. However, in cases where provincial ministries are not required to post a regular proposal notice, they can still provide a public service by posting an information notice. These notices keep Ontario's residents informed of important environmental developments.

During the 2007/2008 reporting year, nine ministries posted a total of 88 information notices. The ECO's review found that while some of these postings constituted acceptable and even commendable uses of information notices, sharing important information with the public, others were unacceptable in that they should have been posted as regular proposal notices for full public consultation.

Section 3 – Ministries' Use of Exception Notices

Under the *EBR*, there are limited circumstances in which ministries may proceed with an environmentally significant decision and then inform the public through an "exception notice," instead of following the normal process of posting a proposal notice for prior public notification and consultation. Exception notices may be used in cases of emergency, or when another equivalent public participation process takes place instead. In 2007/2008, only the Ministry of the Environment made use of exception notices. Section 3 provides a summary of each exception notice, and the ECO's assessment of whether the use of the exception provisions was appropriate.

Section 4 – Decision Reviews

Each year the ECO reviews a sampling of the environmentally significant decisions made by ministries prescribed under the *EBR*. During the 2007/2008 reporting year, approximately 1600 decision notices were posted on the Environmental Registry, most of them for site-specific permits or approvals. Fifty-eight decisions were for policies, nine for Acts and 42 for regulations. Whether the ECO conducts a detailed review on a ministry decision depends on the decision's environmental significance and on the public's interest in the decision. Section 4 of this report consists of detailed reviews undertaken by the ECO for 12 selected decisions by four ministries.

Sections 5 & 6 – Applications for Review and Investigation

Under the *EBR*, Ontario residents can file "applications for review," asking government ministries to review an existing policy, law, regulation or instrument if they feel the environment is not being protected, or to review the need for a new law, regulation or policy. The public can also make "applications for investigation," asking ministries to investigate alleged contraventions of environmental laws, regulations and instruments. The ECO reviews applications for completeness, and forwards them to the appropriate ministry.

Each reporting year the ECO reviews and reports on the handling and disposition of applications by ministries. In this section we provide a detailed review of applications on which the ministry has made a decision during the reporting year. Applications, which have been received but not responded to by ministries, are also briefly summarized. Section 5 provides a summary and review of applications for review, while Section 6 addresses applications for investigation.

Section 7 – *EBR* Leave to Appeal Applications

For certain instruments issued by ministries, e.g., certificates of approval, permits to take water, Ontario residents have 15 days to seek leave to appeal on the decision after it is posted on the Environmental Registry. If leave is granted, the dispute can proceed to a full tribunal hearing or it can result in a settlement that often addresses some or even most of the concerns raised by the applicants. The ECO posts notices on the Registry of these leave to appeal applications, and updates them once the appropriate appeal tribunal have made their decisions. This section provides a summary of the ten leave to appeal applications under the *EBR* that were filed during the 2007/2008 reporting year.

Section 8 – *EBR* Court Actions

Under section 84 of the *EBR*, residents of Ontario have the right to bring a legal action against someone who is violating or is about to violate an environmental Act, regulation or instrument, and is harming, or about to harm, a public resource. In addition, anyone who suffers, or who may suffer, a direct economic loss or personal injury as a result of a public nuisance that caused harm to the environment may bring a legal action under section 103 of the *EBR*. The ECO is responsible for posting notices of court actions on the Registry for information purposes only. While there were no new court actions brought under the *EBR*, this section provides a summary of the two court actions that were ongoing during the 2007/2008 reporting year.

There were no whistle-blower complaints under the *EBR* during the reporting year.

Section 9 – Status of ECO and Public Requests to Prescribe New or Existing Ministries for Laws, Regulations or Processes under the *EBR*

The ECO constantly tracks legal and policy developments at the prescribed ministries and in the Ontario government as a whole, and encourages ministries to update the *EBR* regulations to include new laws and prescribe new government initiatives that are environmentally significant. Section 9 discusses how the ministries go about prescribing new laws, regulations and ministry processes under the *EBR*, and provides two summary tables outlining the status of ECO and ministry efforts to keep the *EBR* in sync with various recent Acts, regulations and ministry processes.

Section 10 – Key Recommendations of Minister's Review Panel on Environmental Assessment (March 2005) and Implementation as of April 2008

Part Two of this year's Annual Report includes an article entitled: "Environmental Assessment: a Vision Lost". The article details the evolution of the *Environmental Assessment Act* since its proclamation, and provides a detailed review of its deficiencies and recent efforts to obtain reforms. In 2004, the Minister of the Environment appointed an expert advisory panel to recommend ways to improve the EA process. This section of the Supplement provides a summary of the key recommendations from that expert panel and the status of their implementation as of the end of ECO's 2007/2008 reporting year.

Section 11 - Undecided Proposals

As required under section 58(c) of the *EBR*, the ECO reports annually on all proposals posted on the Environmental Registry within the reporting year that have not had a decision notice posted by March 31 of that year. This section provides a summary of the number of undecided policy, Act, regulation and instrument proposals by prescribed ministries.

SECTION 1

ECO REVIEWS OF UNPOSTED DECISIONS

SECTION 1: ECO REVIEWS OF UNPOSTED DECISIONS

Public participation in environmental decision-making is at the heart of the *Environmental Bill of Rights* (*EBR*). Under sections 15, 16 and 22 of the *EBR*, prescribed ministries are required to post notices of environmentally significant proposals for policies, Acts, regulations and instruments on the Environmental Registry. These notices are to be posted for public comment for a minimum of 30 days before a decision is made on the proposal. The ministry must also consider all relevant comments received through public consultation, post a decision notice on the Registry to notify the public when a proposal is implemented, and explain the effect of public comments on the decision.

When it comes to the attention of the Environmental Commissioner of Ontario (ECO) that a ministry subject to the *EBR* has made an environmentally significant decision without first posting a proposal on the Registry, we review that decision to determine whether the public's participation rights have been respected.

Such inquiries can lead to one of several outcomes. The ministry may provide the ECO with legitimate reasons for not posting the decision on the Registry. For example, the decision may not be environmentally significant, or it may fall within one of the exceptions allowed by the *EBR*. In other cases, if the ministry has not yet implemented the decision, it may agree to post a notice on the Registry and allow public input. Finally, in certain cases, the ministry may choose not to rectify the situation, because the decision has already been made, or, unlike the ECO, they do not regard the decision as environmentally significant, or for some other reason. In such cases, the ECO believes that the ministry has not adhered to the requirements of the *Environmental Bill of Rights* (*EBR*) and has deprived the Ontario public of notification and comment rights.

While the ECO monitors decision-making in all prescribed ministries, in 2007/2008, we made inquiries on specific decisions made by the Ministry of the Environment, the Ministry of Natural Resources, the Ministry of Energy, and the Ministry of Health and Long-Term Care. Ten decisions on policies, regulations and instruments, summarized below, were identified by the ECO as unposted decisions. Each summary provides information on the decision, explains the ministry's response to the ECO's inquiry, and discusses whether this response was adequate under the *EBR*.

Ministry of the Environment
- Amendment to Regulation 334 under the *EAA*
- PTTWs issued to DeBeers for Victor Diamond Mine
- Community Go Green Fund

Ministry of Energy
- Community Conservation Initiatives Fund

Ministry of Health and Long-Term Care
- Response to Adverse Drinking Water Quality Incidents: Guidance Document

Ministry of Natural Resources
- Amendments to MNR's Forest Management Directives and Procedures Handbook
- Protocol for Updates to Wetland Mapping
- Waterpower Site Release and Development Review Policy and Procedure
- Aggregate Resources Program Policies and Procedures Manual
- Amendments to Regulations under *FWCA*

1.1 Ministry of the Environment – Regulation

1.1.1 Amendment to Regulation 334 under the *EAA*

Description:

- In September 2007, the Ministry of the Environment (MOE) posted an information notice on the Environmental Registry advising the public that the Ontario government had passed a new regulation (O. Reg. 536/07), amending Regulation 334, R.R.O. 1990, under the *Environmental Assessment Act* (*EAA*).
- O. Reg. 536/07 provides that Minister's Zoning Orders (MZOs) made under the *Planning Act* are not subject to sections 12.2(2) and 12.2(6) of the *EAA*. These amendments allow the Minister of Municipal Affairs and Housing to issue MZOs (which are regulations under the *Planning Act* that establish or amend land uses) in relation to projects subject to the *EAA*, before a proponent obtains environmental assessment (EA) approval. The amendments also allow the Minister to issue MZOs that may be inconsistent with a condition imposed in an EA approval.
- MOE stated in the notice that the regulatory amendments have no negative environmental impacts, and that the regulation was made to "clarify" that MZOs are not subject to sections 12.2(2) and 12.2(6) of the *EAA*.
- On November 8, 2007, the ECO wrote a letter to MOE, expressing the ECO's disagreement with the ministry's description of the regulatory amendments, as well as the ministry's decision to post the regulation as an information notice. The ECO stated that the amendments in O. Reg. 536/07 are environmentally significant, and thus should have been posted on the Registry as a regular proposal notice in order to provide the public with an opportunity to review and comment on the regulation, as required by the *Environmental Bill of Rights*.

Ministry Response:

- MOE responded to the ECO in a letter dated December 28, 2007, reiterating its view that the regulatory amendments merely change the sequencing of the MZO decision and the EA approval decision, and thus are "administrative in nature." Accordingly, MOE stated that it was under no obligation to post a proposal notice on the *EBR* with respect to these regulatory amendments.

ECO Comment:

- The ECO remains unconvinced that the amendments to Regulation 334 under the *EAA* are "administrative in nature." The ECO believes that the decision to reorder the sequencing of approvals, and thus enable other provincial approvals to be granted prior to the EA approval, creates a presumption regarding the ultimate outcome of the EA process. As such, the ECO believes that this regulatory change is environmentally significant and should have been posted as a regular proposal notice on the Registry.
- The ECO notes that an information notice does not involve the same public consultation rights as a proposal notice. Information notices do not include requirements for ministries to seek and consider public comments before making a decision, to consider their Statement of Environmental Values, or to post a decision notice describing the final course of action, along with a summary of how the public comments were considered.

For further discussion of the ECO's concerns regarding the gradual weakening of the EA process, see the section entitled "EA – Vision Lost" in the Annual Report.

1.1 Ministry of the Environment – Instrument

1.1.2 PTTWs issued to DeBeers for Victor Diamond Mine

Description:

- On June 15, 2007, MOE posted three proposal notices on the Registry relating to three Permits to Take Water (PTTWs) issued to DeBeers Canada Limited for its Victor Diamond Mine in northern Ontario. The ministry provided a 30-day comment period for each proposal.
- On July 18, 2007, the ministry removed the proposal notices, stating that the original posting of these notices was an error, and reposted the PTTWs as exception notices.
- MOE stated that it was relying on section 30 of the *Environmental Bill of Rights* (*EBR*) – which provides that a proposal notice is not required if the instrument has already been considered through an equivalent public participation process – as the basis for the exception. MOE stated that the equivalent public participation process through which the PTTWs had been considered was the federal comprehensive study process for the Victor Diamond Mind project under the *Canadian Environmental Assessment Act* (*CEAA*).
- On August 7, 2007, the ECO wrote to MOE, urging the ministry to reconsider its decision to repost the PTTWs as exception notices. The ECO expressed strong disagreement with the ministry's view that the *CEAA* process was an "equivalent public participation process", and further noted that, in any event, the particular PTTWs were not subject to public consultation during the federal *CEAA* process.

Ministry Response:

- On October 17, 2007, MOE sent a brief letter to the ECO, stating that it would be inappropriate for the ministry to respond to the matters raised in the ECO's letter, as these issues were currently the subject of litigation. (The ECO notes that no formal court proceedings had been initiated regarding this matter as of April 2008.)
- MOE did, however, enclose a separate letter (which had previously been sent to an environmental group) setting out the ministry's explanation for the use of the exception notices. This letter explained that the original posting was a procedural oversight and that the permits had already been considered under an equivalent public consultation process (i.e., the *CEAA* process).
- In November and December 2007, MOE posted five more exception notices on the Registry relating to three additional PTTWs and two Certificates of Approval (Cs of A) for sewage works issued to DeBeers in relation to the Victor Diamond Mine.

ECO Comment:

- The ECO disagrees with the ministry's view that the PTTWs (including the specific terms and conditions included in each of these PTTWs) have already been considered under an equivalent public participation process under section 30 of the *EBR*.
- The ECO believes that MOE's decision to issue each of the PTTWs needs to be considered at the provincial level through the use of the Registry, including an opportunity for the public to comment on and appeal the PTTWs, as required by the *EBR*.
- MOE's view that it may post "exception notices" (rather than proposal notices) for instruments, such as the PTTWs and Cs of A, that are associated with major environmentally significant projects reviewed under the federal *CEAA* process, will result in a major loss of transparency of government decision-making and an erosion of public rights. Through the use of exception notices, MOE is not required to demonstrate how it considered the comments received, nor to provide the public with important leave to appeal rights, otherwise provided by the *EBR*.

1.1 Ministry of the Environment – Policy

1.1.3 Community Go Green Fund

Description:

- In October 2007, the ECO became aware that MOE had developed a new program called the "Community Go Green Fund" (CGGF), which was about to be implemented as part of the province's Climate Change Plan for Ontario.
- MOE stated that the funding program would provide $6.6 million in grants over four years to support community initiatives aimed at addressing climate change in Ontario.
- The ministry had not posted a notice on the Registry regarding the CGGF program.
- On October 26, 2007, the ECO wrote a letter to MOE, pointing out that the CGGF program represents an initiative of environmental significance, and thus should be posted as a proposal notice on the Registry.

Ministry Response:

- In November 2007, MOE contacted the ECO office to advise that the ministry would not be posting a regular proposal notice on the Registry, as the program, in MOE's opinion, is predominantly financial or administrative, and therefore is not subject to the proposal notice requirements under the *EBR*. MOE stated, however, that the ministry would be pleased to post an information notice on the Registry.
- On December 5, 2007, MOE posted an information notice on the Registry advising the public of the new CGGF.

ECO Comment:

- The ECO continues to believe that the funding program is environmentally significant and not "predominately" financial in nature. While there is a clear financial aspect to this program, this does not negate the ministry's responsibility to post this environmentally significant policy on the Registry. The CGGF program sets out part of the provincial policy for addressing climate change, which should have been made open to public comment.
- While the ECO is disappointed that the ministry did not post this proposal as a regular proposal notice, the ECO notes that MOE did post an information notice on the Registry to at least advise the public of this program.

1.2 Ministry of Energy – Policy

1.2.1 Community Conservation Initiatives Fund

Description:

- In October 2007, the ECO became aware that the Ministry of Energy (ENG) had established and implemented a new program called the Community Conservation Initiatives (CCI) Fund.
- The ministry stated that the CCI Fund provides financial support to incorporated not-for-profit organizations that deliver local energy conservation initiatives.
- Through the CCI funding program, the ministry had provided $750,000 in funding to over 24 projects in 2006/2007, and had allocated a further $1.5 million for funding projects in 2007/2008.
- ENG failed to post a notice about the program on the Environmental Registry as required by the *EBR*.
- On November 5, 2007, the ECO wrote to ENG, reminding the ministry of its obligation under the *EBR* to post proposal notices for environmentally significant policies on the Registry for public notice and comment. The ECO also asked the ministry to provide information regarding: how it considered its Statement of Environmental Values (SEV); why it chose not to post the policy on the

Registry; and whether the ministry undertook other public consultation in the development of this funding program.

Ministry Response:

- In a letter dated December 21, 2007, ENG responded to the ECO stating that the CCI Fund is a successor program to the 2004 Energy Conservation Partnerships program (which was discontinued in 2006), and that the need to reinstate a funding program was identified though consultations with other key conservation funding agencies.
- ENG also stated that the CCI Fund supports the ministry's SEV by encouraging energy conservation, as well as supports the government's policy direction for aggressive conservation efforts – as expressed in the province's Integrated Power System Plan (IPSP). The ministry noted that ENG engaged in a public consultation process for the development of the IPSP, in which the public expressed strong support for conservation efforts.

ECO Comment:

- While the ECO recognizes that the new program may support both the ministry's SEV and its conservation goals, the ECO notes that even programs with positive environmental effects are subject to the notice and comment requirements under the *EBR*.
- The ECO also notes that neither ENG's consultation with respect to the IPSP, which developed broad principles supporting conservation, nor its internal consultation with select agencies, satisfies ENG's obligations under the *EBR* to consult with the public regarding the specific policy direction of the conservation funding program.
- The ECO urges ENG to make better use of the Registry in the future, and to employ a fully transparent and open consultative process with the general public, rather than limit consultation to a small group of stakeholders.

1.3 Ministry of Health and Long-Term Care – Policy

1.3.1 Response to Adverse Drinking Water Quality Incidents: Guidance Document

Description:

- On May 18, 2007, the Ministry of Health and Long-Term Care (MOHLTC) posted an information notice advising the public of a new document entitled "Response to Adverse Drinking Water Quality Incidents: Guidance Document".
- This document sets out guidance and best practices to assist Public Health Units and drinking-water system owners and operators in responding to adverse drinking-water events. The document recommends responses to potential adverse drinking-water events, and describes circumstances under which a Boil Water Advisory, Drinking Water Advisory, or Order may be issued.
- The document was created in place of a previous draft document proposed in 2004 entitled: "Protocol for the Issuance of a Boil Water or a Drinking Water Advisory". MOHLTC had posted a proposal notice on the Registry for the earlier 2004 draft document.
- On July 12, 2007, the ECO sent a letter to MOHLTC stating that, like the prior draft document, this new Guidance Document similarly constitutes environmentally significant policy, which should be posted on the Registry as a regular proposal notice to provide full public notice and comment as required by the *EBR*.

Ministry Response:

- MOHLTC responded to the ECO in a letter dated July 30, 2007, explaining that the new guidance document was originally posted on the Environmental Registry as an Information Notice because it was "considered a 'living document' to be reviewed and updated by the ministry at regular intervals, as required, based on feedback received." Nonetheless, in response to the ECO's request, the ministry stated that it would repost the document on the Registry as a regular proposal notice for greater public accountability and transparency.

- On November 20, 2007, as promised, MOHLTC reposted the Guidance Document as a proposal notice, providing a 30-day comment period.

ECO Comment:

- The ECO is pleased that MOHLTC took the necessary steps to repost the Guidance Document as a proposal notice on the Registry, as required by the *EBR*. The ECO commends MOHLTC for recognizing the importance of providing an open and transparent opportunity for public comment.
- The ECO hopes that MOHLTC will similarly fulfill its obligation to post a proposal notice on the Registry for all future environmentally significant amendments or updates to the document.

1.4 Ministry of Natural Resources – Policy

1.4.1 Amendments to MNR's Forest Management Directives and Procedures

Description:

- In July 2007, the ECO became aware that the Ministry of Natural Resources (MNR) had revised some of the directives and procedures contained in MNR's compendium of Forest Management Directives and Procedures (the "Compendium").
- Some of the amendments to the Compendium constitute environmentally significant policy changes. For example, MNR included a new procedure in the Compendium entitled "Ground Application of Herbicides for Forest Management in Ontario (Interim)", which sets out buffer zone requirements for pesticide applications near water.
- MNR did not post a notice on the Registry for public comment with respect to the amendments to the Compendium, nor has MNR made the procedures and directives in the Compendium available to the public.
- The ECO has raised the issue of MNR's failure to post the procedures and directives contained in the Compendium on the Registry on several previous occasions (see, for example, pages 13-14 of the Supplement to the 2000-2001 Annual Report, and page 5 of the Supplement to the 2001-2002 Annual Report). The ECO has also expressed general concern regarding MNR's pattern of developing or revising forest management policies without providing notice or opportunities for consultation (see pages 174-175 of our 2005-2006 Annual Report).
- On July 25, 2007, the ECO sent a letter to MNR, reminding the ministry of its obligations under the *EBR* to post a proposal on the Registry for public notice and comment.

Ministry Response:

- MNR responded to the ECO in a letter dated October 15, 2007, stating that the majority of the procedures and directives in the Compendium are "administrative and/or financial in nature" and therefore do not need to be posted on the Registry.
- MNR further stated that the Compendium is "a work in progress" that is currently being reviewed by the ministry. MNR stated that about half of the directives and procedures are "interim", which MNR describes as preliminary, draft versions for internal policy development purposes only, that have not yet been approved.
- Following the completion of the review (expected for spring 2008), however, MNR committed to posting all approved forest management directives and procedures in the new Compendium on MNR's public website, as well as posting an information notice on the Registry.
- MNR also stated that the ministry will assess each "finalized" procedure for environmental significance and post a policy proposal notice on the Registry for those procedures that require a notice. MNR did, in fact, post a proposal notice on the Registry for its amended Forest Compliance Handbook (which is part of the Compendium) on February 1, 2008.

ECO Comment:

- The ECO is pleased by MNR's commitments to make the Compendium publicly available by posting it on MNR's website and to provide public notice of the new Compendium on the Registry.
- However, the ECO disagrees with MNR's contention that "the majority of MNR's forest management directives and procedures are administrative and/or financial in nature." To the contrary, the ECO believes that many of these directives and procedures (such as the application of herbicides) do contain environmentally significant policy and are of considerable public interest. Accordingly, the ECO urges MNR to post any revised or new policies or directives with *any* environmental significance as a proposal notice on the Registry, as required by the *EBR*, to provide an opportunity for the expression of public concerns.
- In addition, as stated in past Supplements to the ECO's Annual Reports, the ECO notes that even policies described as "interim" or "draft for internal policy development purposes" are subject to the proposal notice requirements under the *EBR*, if those policies are being used, applied or otherwise relied on, even if only on an interim or temporary basis.

1.4.2 Protocol for Updates to Wetland Mapping

Description:

- In October 2007, the ECO became aware that the Ministry of Natural Resources (MNR) had developed a new protocol, entitled: "Protocol for Updates to Section 28 Mapping under O. Reg. 97/04: Development, Interference with Wetlands and Alterations to Shorelines and Watercourses."
- This Protocol is intended to ensure consistent recording and tracking of the updates to wetland mapping that are produced by the Conservation Authorities (pursuant to the requirements in O. Reg. 97/04).
- MNR did not post a notice on the Registry for public notice and comment for this Protocol.
- On November 8, 2007, the ECO wrote to MNR, advising the ministry that a proposal notice should have been posted on the Registry for public notice and comment, as required by the *EBR*.

Ministry Response:

- On May 7, 2007, MNR responded to the ECO, stating that the Protocol is not new policy, but rather, is merely a guideline produced by Conservation Ontario to assist the conservation authorities in implementing the wetland mapping updating requirements under O. Reg. 97/04.
- MNR also noted that O. Reg. 97/04 underwent extensive public consultation and review pursuant to the *EBR* when it was developed.

ECO Comment:

- The ECO believes that the Protocol is of public interest. Accordingly, the ECO suggests that the document should have been posted on the Registry as an information notice to provide the pubic with notice.

1.4.3 Waterpower Site Release and Development Review Policy and Procedure

Description:

- In May 2007, the ECO became aware that the Ministry of Natural Resources (MNR) had revised its "Waterpower Site Release and Development Review" Policy and the related Procedure, which was issued on May 14, 2007.
- The two documents together set out the ministry's policies and procedures for releasing potential waterpower sites to developers.
- The May 2007, revisions to the document provide restrictions to site release for sites that are located within Provincial Parks or Conservation Reserves, or that would require infrastructure

affecting a naturally reproducing lake trout lake. The revised documents also include additional provisions relating to Aboriginal consultation and Aboriginal economic development.
- MNR had posted the initial 2004 version of the Waterpower Site Release Policy on the Registry as a regular proposal; however, MNR did not post the revised policy and procedure on the Registry.
- On May 17, 2007, the ECO contacted MNR to request additional information about the revisions to the policy and procedure, and to inquire whether the ministry intended to post the revisions on the Environmental Registry.

Ministry Response:
- On May 22, 2007, MNR provided the ECO with a copy of the changes made to both the policy and the procedure, and confirmed that the revised versions of both of these documents would not be posted on the Registry.

ECO Comment:
- The ECO believes that some of the revisions to the Waterpower Site Release policy and procedure constitute environmentally significant policy changes.
- The ECO reminds MNR once again that any policies that are developed, amended or revoked that are of environmental significance must be posted on the Registry to provide an opportunity for public consultation and ensure government accountability and transparency, as required by the *EBR*.

1.4.4 Aggregate Resources Program Policies and Procedures Manual

Description:
- In April 2007, the ECO became aware that MNR was revising some of the rules contained in its Aggregate Resources Program Policies and Procedures, as they apply to certain areas in northern Ontario.
- In January 2007, MNR had expanded the areas designated under the *Aggregate Resources Act* (*ARA*) to new aggregate resource regions in northern Ontario. To soften the financial impact of the aggregate rules on the newly regulated aggregate operators in the expanded areas, MNR made some revisions to its aggregate policies. These include: waiving application fees for aggregate licenses, extending the timeline for MNR staff to provide demand notices to operators (which require operators to submit site plans), and simplifying site plan requirements. (For more information, see the application for review of MNR's decision to extend the *ARA* to Parry Sound District in this Supplement.)
- On April 19, 2007, the ECO wrote to MNR, reminding the ministry of its obligation to post any revisions to the Aggregate Resources Program Policies and Procedures as a proposal notice on the Environmental Registry, as required by the *EBR*.

Ministry Response:
- On May 7, 2007, MNR responded to the ECO, stating that the Aggregate Resources Program Policies and Procedures Manual provide MNR staff with the needed flexibility to vary requirements to address site-specific circumstances. MNR further stated that this flexibility ensures that the needs of small operators are specifically addressed, and should result in an increased number of operations being licensed, which ultimately benefits the environment.

ECO Comment:
- While it may be true that the Aggregate Resources Program Policies and Procedures Manual provides MNR staff with flexibility on when to serve licensees with demand notices, the same manual does recommend that demand notices be provided within six months of MNR receiving an application. MNR has made a decision "across the board" to give aggregate operators in newly prescribed areas of Ontario three years to prepare a site plan rather than the normal six months. MNR's decision to effectively delay the requirement to prepare site plans for the newly prescribed

operations by two and half years appears to the ECO to be a significant policy decision, which should have been posted on the Registry for public notice and comment.

- The ECO urges MNR to post all future environmentally significant amendments to its Aggregate Resources Program Policies and Procedures as proposal notices on the Environmental Registry for full public comment.

1.4 Ministry of Natural Resources – Regulation

1.4.5 Amendments to Regulations under the *FWCA*

Description:

- In July 2007, the Ontario government filed two new regulations amending the Fish Licensing Regulation (O. Reg. 664/98) and the Hunting Regulation (O. Reg. 665/98) under the *Fish and Wildlife Conservation Act* (*FWCA*).
- These regulatory amendments established a ban on the commercial harvest and sale of frogs as fishing bait, and allowed anglers to capture northern leopard frogs, subject to restrictions.
- MNR did not post a notice on the Registry regarding these regulatory changes. MNR had posted a policy proposal notice on the Registry in February 2006, relating to the use of frogs and crayfish for bait in Ontario; however, no decision notice had yet been posted.
- The ECO contacted MNR to inquire about: the relation of the regulatory changes to the 2006 policy proposal; the status of the decision on the policy proposal; and the ministry's failure to post a proposal notice on the Registry with respect to the new regulations.

Ministry Response:

- MNR advised the ECO that the regulatory changes were the result of the policy review conducted by the ministry, which was posted on the Registry and was subject to public consultation pursuant to the *EBR*.
- MNR also stated that, in future cases like this one, the ministry would post a decision notice for the policy proposal on the Registry before any regulatory changes were finalized.
- On March 17, 2008, MNR did post a decision notice for the 2006 policy proposal relating to the use of frogs and crayfish for bait in Ontario. Strangely, though, the decision notice stated that, as a result of the policy proposal, a decision was made on January 1, 2008 to ban the commercial harvest and sale of all bait frogs, but permit anglers to capture northern leopard frogs (subject to restrictions). However, these decisions had already been implemented via the regulatory amendments filed in July 2007, which took effect January 1, 2008.

ECO Comment:

- The ECO is pleased that MNR, albeit belatedly, posted a decision notice on the policy proposal, which explained the outcome of the review and consultation process – i.e., the introduction of the regulatory amendments.
- The ECO also accepts MNR's explanation for not posting a proposal notice on the Registry for the regulatory amendments, as they were already subject to consultation in the form of the policy proposal. However, the ECO stresses the importance to MNR of posting decision notices in a timely manner, to improve dissemination of information to the public, and ensure greater transparency and public accountability.

SECTION 2

ECO REVIEWS OF INFORMATION NOTICES

SECTION 2: ECO REVIEWS OF INFORMATION NOTICES

2.1 Use of Information Notices

In cases where provincial ministries are not required to post a proposal notice on the Environmental Registry for public comment, they may still provide a public service by posting an "information notice" under section 6 of the *EBR*. These notices keep Ontarians informed of important environmental developments.

Ministries should use an information notice only when they are not required to post a regular notice for public comment (under sections 15, 16 or 22 of the *EBR*). Significant differences exist between regular proposal notices posted on the Registry and information notices. With regular proposal notices, a ministry is required to consider public comments and post a decision notice explaining the effect of comments on the ministry's decision. The ECO then reviews the extent to which the minister considered those comments when he or she made the final decision. Ministries must also consider their Statements of Environmental Values in the decision-making process. Third-party appeal rights are only available for instruments if they are posted as regular proposal notices. This approach is superior to posting an information notice and provides greater public accountability and transparency.

As described in more detail in the ECO's 2000-2001 Annual Report, if a prescribed ministry decides that it is appropriate to seek public comment on a policy, Act or regulation proposal through the Registry, the correct procedure is to post a proposal notice, not an information notice. Soliciting comments through information notices causes confusion for the public, since, as noted above, there is no legal requirement for the ministries to consider public comments or to post a final decision notice explaining how comments were considered. The ECO accepts, however, that it may be appropriate for ministries to use information notices to solicit comments on initiatives that are clearly exempted from the *EBR* posting requirements, for example *Environmental Assessment Act* exceptions and regulations that are not prescribed under the *EBR*. The ECO encourages ministries in this situation to post a follow-up notice informing the public about the decision and how comments were considered.

During the 2007/2008 reporting year, nine ministries posted a total of 88 information notices. However, for the purposes of tracking year-to-year trends, the ECO does not double-count repostings of previous initiatives (as ministries often post updates on information notices), or notices that relate to Forest Management Plans. In 2007/2008, the ECO excluded 25 updates to existing notices, and 10 notices relating to Forest Management Plans. Accordingly, for ECO tracking purposes, the ministries posted 53 information notices in 2007/2008.

Ministry	**Number of Information Postings**
Energy (ENG)	1
Environment (MOE)	13
Health and Long-term Care (MOHLTC)	1
Labour (MOL)	1
Municipal Affairs and Housing (MMAH)	7
Natural Resources (MNR)	10
Northern Development and Mines (MNDM)	10
Public Infrastructure Renewal (PIR)	2
Transportation (MTO)	8

Good Uses of Information Notices:
Several Ministries used information notices during this reporting period to inform the public about initiatives which are legally excepted from the requirement to post regular proposal and decision notices.

For example:

- MOE posted a notice informing the public of advice received from the "Advisory Council on Drinking-Water Quality and Testing Standards" regarding corrosion control and lead reduction in drinking-water in Ontario. The Advisory Council, which provides the provincial government with expert advice and recommendations on drinking water related issues, is not required to post proposal notices on the Registry. However, if the ministry moves forward with any of the Advisory Council's recommendations, the ministry will then be required to post a regular proposal notice.

- MOE similarly posted a notice informing the public of the "Final Report of the Advisory Panel on the Ontario Drinking Water Stewardship Program." MOE explained that the expert advice of the Advisory Panel on the "Ontario Drinking Water Stewardship Program" will be considered by the government in the development of this funding program and its supporting regulation under the *Clean Water Act*. The ministry noted that it anticipates consulting on the development of this regulation in 2007/2008.

- MOE made good use of an information notice to advise the public of an opportunity to participate in a public consultation meeting on Ontario's Drinking Water Quality Standard for Tritium, which was being held by the "Advisory Council on Drinking Water Quality and Testing Standards." The information gathered in this public consultation session will be used by the Advisory Council in providing advice to MOE.

- MOE also made good use of an information notice to bring attention to the public of an opportunity to provide comments to the Governments of Canada and the U.S. on the review of the Canada-U.S. "Great Lakes Water Quality Agreement of 1978."

- MOE posted an information notice for an application by the City of Orillia for approval to develop a Multi Use Recreational Facility (MURF) on a former Waste Disposal Site. This approval request was exempt from the Registry posting requirements because it was part of a project subject to the *Environmental Assessment Act* (pursuant to section 32 of the *EBR*); however, MOE decided to post the information notice to keep the public fully informed of the developments on this project, which was of significant local interest.

- MNR also made good use of an information notice by advising the public of the recommendations made by the Ontario Parks Board of Directors, an advisory committee to MNR, regarding "Lightening the Ecological Footprint of Logging in Algonquin Provincial Park." The ministry also invited the public to comment on these recommendations. As a result, over 8,000 comments were submitted to the ministry in response to this notice. MNR noted that, if a decision is made to proceed with these recommendations, the process would involve public consultation and appropriate postings on the Registry.

- MNR also posted an information notice to advise the public that agreements had been signed between Canada and Ontario to establish the "National Marine Conservation Area" in Lake Superior.

Inappropriate Uses of Information Notices:
On several occasions Ministries used information notices inappropriately during this reporting period, stating that the initiatives were not "policy decisions" for a variety of reasons. For example:

- MOE should have posted a regular proposal notice for its amendments to Regulation 334, R.R.O 1990, under the *Environmental Assessment Act*, regarding Minister's Zoning Orders (MZOs). The ECO believes that these amendments, which allow the Minister of Municipal Affairs and Housing to make zoning orders before the environmental assessment process is over, are environmentally significant. Because the ECO followed up with MOE on this notice, it is described in the "Unposted Decisions" section of this Supplement.

- Similarly, MOE should have posted a regular proposal notice for its amendments to Regulation 334, R.R.O 1990, under the *Environmental Assessment Act*, regarding the streamlining of environmental assessments for surface transit projects. These amendments, which allow new bus service on exclusive Right-of-Way projects and new rail transit system projects to use the "transit chapter" in the Municipal Class EA, are environmentally significant.

- MOE should have posted its "Sewer Use Best Management Practices Documents for Industrial Discharges to Municipal Sewers," as a decision notice for the 1998 proposal notice for MOE's proposed Model Sewer Use Bylaw. The related 1998 proposal notice still does not have a decision notice posted. The ECO believes that MOE could have provided greater clarity and transparency by posting a decision notice for the 1998 proposal, including an explanation of the ministry's decision to develop the Best Management Practices documents instead of the Model Sewer Use Bylaw, or, if that is not the case, of the relationship between these new documents and the proposed Model Sewer Use Bylaw.

- MOE should have posted a proposal notice for its "Community Go Green Fund" – a new funding program to support community initiatives aimed at addressing climate change. The ECO wrote to MOE stating that the program constitutes an environmentally significant policy initiative that should be posted on the Registry for public comment. In response to the ECO's letter, MOE posted an information notice on the Registry. While this provided the public with notice, the ECO continues to believe that this program should have been posted as a regular proposal notice to provide the public with an opportunity to comment. (For further details on this notice, see the section on "Unposted Decisions" in this Supplement.)

- MNR should have posted a regular proposal notice for its "Scaling Manual 3rd Edition (April 2007)." The ECO does not agree that all of the revisions to the manual are purely administrative. The revisions to the manual include a reduction in the allowable maximum diameter for tree tops left as waste (i.e., burned or left at roadside). MNR notes that this revision should provide for better wood utilization and reduce the amount of wood slash considered waste. The ECO notes that all environmentally significant policy changes, even positive ones, need to be posted as full proposal notices on the Registry.

- MOHLTC posted an information notice in May 2007 advising the public of a new document entitled "Response to Adverse Drinking Water Quality Incidents: Guidance Document". The ECO advised MOHLTC that this Guidance Document constitutes environmentally significant policy that should be posted on the Registry as a regular proposal notice. As a result, on November 20, 2007, MOHLTC properly reposted the Guidance Document as a proposal notice, providing a 30-day comment period. (For further details on this notice, see the section on "Unposted Decisions" in this Supplement.)

Ministry Decisions that are Not Prescribed:
Various Ministries posted environmentally significant decisions as information notices because they fall under ministries or Acts that have not yet been prescribed under the *EBR*. Examples this year include:

- ENG posted an information notice in January 2008 for a new regulation under the *Energy Conservation Leadership Act, 2006*, to encourage and permit the use of outdoor clotheslines. This Act is not yet prescribed; however, on April 18, 2008, MOE posted a proposal on the Registry indicating that MOE intends to prescribe this Act under the *EBR*.

- MOL posted an information notice for a regulation under the *Regulatory Modernization Act, 2007*, as that Act is not prescribed.

- PIR posted an information notice for its "Final Built Boundary for the Growth Plan for the Greater Golden Horseshoe, 2006," as the ministry is not yet prescribed under the *EBR*. The ECO notes that our office has been requesting that PIR be prescribed under the *EBR* ever since the ministry was created in 2004. In early 2008, MOE advised the ECO that it intends to prescribe PIR; however, when MOE posted a proposal on the Registry in April 2008 to prescribe certain Ministries and Acts, PIR was not included in the proposal (see section 9 of this Supplement for a more detailed discussion of the issue of prescribing PIR.) The lack of progress in prescribing PIR under the *EBR* is a significant disappointment as proposals such as this by PIR are clearly environmentally significant.

- MTO posted seven information notices on behalf of Metrolinx, an MTO agency that is not prescribed, in respect of Metrolinx's "Green Papers" for its Regional Transportation Plan for the Greater Toronto and Hamilton Area (GTHA). The ECO commends Metrolinx for posting these notices and encourages it to continue posting information notices throughout the development of its transportation plan for the GTHA.

- MMAH posted five information notices for Minister's Zoning Orders (MZOs), which are regulations under the *Planning Act* that establish or amend land uses that are either in areas outside of municipalities, or are of a provincial interest. Even though MZOs are regulations under a prescribed Act, the ECO recognizes that most of these zoning orders are of minimal environmental significance, and thus are appropriately posted as information notices. However, the ECO reminds MMAH of its continuing obligation to post environmentally significant MZOs of provincial interest as regular proposal notices on the Registry.

- MNDM posted 10 information notices during this reporting period for amendments to mine closure plans. MNDM did not classify amendments to mine closure plans (proposed by the licensee) as instruments under the *EBR*. The ECO continues to encourage MNDM (see page 19 of the ECO 2005-2006 Supplement) to consider regulatory or legislative amendments in order to provide opportunities for public participation on closure plan amendments through regular proposal notices on the Registry in the future.

The ECO supports the ministries' approach to posting information notices for proposals and decisions that are not prescribed. However, as previously recommended, the ECO continues to urge the government to prescribe new government laws and initiatives that are environmentally significant under the *EBR* within one year of implementation to ensure that environmentally significant decisions are appropriately posted. (See section 9 of this Supplement for a more detailed discussion of the issue of prescribing Ministries and Acts).

2.2 Summary of all New Information Notices Posted during the 2007/2008 Reporting Year

Registry Number	Type	Title	Ministry's Rationale for Information Notice	Date Published
Ministry of Energy				
010-2553	ENG regulation	Making a regulation under the *Energy Conservation Leadership Act, 2006* to encourage and permit the use of outdoor clotheslines.	Act not prescribed	January 21, 2008
Ministry of the Environment				
010-0535	MOE policy	Review of the Canada-United States Great Lakes Water Quality Agreement of 1978	Notice of Canadal/U.S. consultation process	May 17, 2007
010-0725	MOE policy	Advisory Council on Drinking-Water Quality and Testing Standards Review of Corrosion	Notice of Advisory Council advice; not policy	June 4, 2007

Registry Number	Type	Title	Ministry's Rationale for Information Notice	Date Published
		Control Measures and Lead Reduction		
010-0694	MOE policy	Final Report of the Advisory Panel on the Ontario Drinking Water Stewardship Program	Report of Advisory Panel; proposal notice will be posted when regulation is being developed	June 14, 2007
010-0329	MOE regulation	Amendments to Regulation 334 of the Revised Regulations of Ontario, 1990, General, under the *EAA*	Administrative	July 16, 2007
010-1056	MOE policy	Sewer Use Best Management Practices Documents for Industrial Discharges to Municipal Sewers	Not policy	August 10, 2007
010-1032	MOE policy	Exemptions from Administrative Fees for Applications for Permits To Take Water	Predominantly financial in nature	August 14, 2007
010-1485	MOE regulation	Amendment to O. Reg. 334 under the *Environmental Assessment Act* regarding Minister's Zoning Order under the *Planning Act*	Not environmentally significant	September 7, 2007
010-2074	MOE policy	Community Go Green Fund	Predominantly financial or administrative in nature	December 5, 2007
010-2298	MOE instrument	Amendment to a Certificate of Approval No. A181008 held by Newalta Corporation (Newalta Hamilton Stoney Creek Landfill Liaison Committee)	section 32 exception - *EAA*	February 12, 2008
010-2131	MOE policy	Amendment to Step-by-step Guideline to O. Reg. 127/01	Harmonizing standards with Federal NPRI	February 20, 2008
010-2757	MOE policy	An invitation by the Advisory Council on Drinking Water Quality and Testing Standards to participate in a public consultation meeting on Ontario's Drinking Water Quality Standard for Tritium.	Notice of Advisory Council consultation (not prescribed)	February 28, 2008
010-2123	MOE instrument	Consideration to issue *EPA* section 46 approval for use of a former Waste Disposal Site (WDS) as part of the City of Orillia's (City) proposed Multi Use Recreational Facility (MURF).	section 32 exception - *EAA*	March 7, 2008
010-1189	MOE policy	Release of two reports: "Drive	No policy decision	March 18,

Registry Number	Type	Title	Ministry's Rationale for Information Notice	Date Published
		Clean Program Emissions Benefit Analysis – Light Duty Vehicles and Heavy Duty Non-Diesel Vehicles: 1999-2005" and "Drive Clean Program Emissions Benefit Analysis – Heavy Duty Diesel Vehicles: Years 2000-2005"		2008
Ministry of Health and Long-term Care				
010-0549	MHLTC policy	Response to Adverse Drinking Water Quality Incidents: Guidance Document	Policy is a "living document" (*This was subsequently posted as a proposal notice – 010-1668)	May 18, 2007
Ministry of Labour				
010-2220	MOL regulation	Regulation Proposal under the *Regulatory Modernization Act, 2007*	Not prescribed	January 8, 2008
Ministry of Municipal Affairs and Housing				
010-0365	MMAH Act	Proposed legislative reforms supporting brownfield redevelopment (Bill 187, *Budget Measures and Interim Appropriation Act, 2007*)	Update of outcome from another Registry consultation process	May 3, 2007
010-0661	MMAH regulation	O. Reg. 155/07, amending O. Reg. 482/73, made under the *Ontario Planning and Development Act, 1994*.	Not prescribed (MZO)	June 4, 2007
010-1208	MMAH regulation	O. Reg. 348/07 requires a hearing officer to give notice of a hearing to prescribed persons and public bodies in the prescribed manner, pursuant to sub-section 13(1) and sub-section 18(6) of the *Greenbelt Act, 2005*	No explanation provided	September 4, 2007
010-2307	MMAH regulation	O. Reg. 557/07 revoking O. Reg. 182/81	Not prescribed (MZO)	December 13, 2007
010-2698	MMAH regulation	O. Reg. 3/08	Not prescribed (MZO)	March 6, 2008
010-2854	MMAH regulation	O. Reg. 1/08	Not prescribed (MZO)	March 7, 2008
010-2855	MMAH regulation	O. Reg. 2/08	Not prescribed (MZO)	March 7, 2008

Registry Number	Type	Title	Ministry's Rationale for Information Notice	Date Published
Ministry of Natural Resources				
010-0445	MNR policy	Recommendations of the Ontario Parks Board of Directors Regarding Lightening the Ecological Footprint of Logging in Algonquin Provincial Park	Not policy	May 2, 2007
010-0531	MNR regulation	Amend Part 7 of O. Reg. 663/98 (Areas South of the French and Mattawa Rivers where Sunday Gun Hunting is Permitted) under the *Fish and Wildlife Conservation Act*	Consultation already carried out under previous Registry process	May 9, 2007
010-0666	MNR policy	Walleye Rehabilitation Plan for Moon River – Eastern Georgian Bay	Operational plan that implements policy already developed	June 4, 2007
010-0784	MNR notice of disposition	Proposed Transfer of Crown Land to Missinabi Cree First Nation	section 32 exception - *EAA*	June 18, 2007
010-1053	MNR policy	Amendments to the Forest Management Planning Manual set out in the Addendum dated February 2007	Incorporates new policy already subject to Registry consultation	July 27, 2007
010-1393	MNR policy	MNR advises it is in the process of developing a proposal for a "Guideline to Assist in the Review of Wind Power Proposals: Potential Impacts to Bats and Bat Habitats" and is inviting comments on the developmental working draft material to assist in the development of a policy proposal	Early notice; expect policy proposal in future	August 21, 2007
010-1399	MNR policy	Ministry of Natural Resources' Scaling Manual 3rd Edition (April 2007)	Administrative revisions only	August 22, 2007
010-2080	MNR policy	Agreements Between Canada and Ontario for the Establishment of the National Marine Conservation Area in Lake Superior	Notice of Agreement; not policy	December 5, 2007
010-0986	MNR policy	Ministry of Natural Resources Consulting the Public Regarding Fish Stocking in Lake Huron and Lake Superior	Early information gathering; not new policy	January 4, 2008
010-2806	MNR policy	Notice of 2008 Prescribed Burns	Not policy	February 25, 2008

Registry Number	Type	Title	Ministry's Rationale for Information Notice	Date Published
MNR Forest Management Plans				
010-0310	MNR instrument	Forest Management Plan - Contingency Plan for the Cochrane-Moose River Forest for the period April 1, 2008 to March 31, 2010 – Review of Draft Plan	Not prescribed	April 18, 2007
010-1234	MNR instrument	Forest Management Plan (FMP) for the Sapawe Forest for the 10-year period April 1, 2010 to March 31, 2020 – Invitation to Participate	Not prescribed	July 30, 2007
010-1782	MNR instrument	Forest Management Plan Contingency Plan for the Kenogami Forest 1-year period of April 1, 2010 to March 31, 2011 – Draft Plan Review	Not prescribed	September 28, 2007
010-1866	MNR instrument	Forest Management Plan for the Gordon Cosens Forest for the 10-year period April 1, 2010 to March 31, 2020 – Invitation to Participate	Not prescribed	October 17, 2007
010-2022	MNR instrument	Forest Management Plan for the Lake Nipigon Forest for the 10-year period April 1, 2010 to March 31, 2020 - Invitation to Participate	Not prescribed	November 5, 2007
010-2219	MNR instrument	Forest Management Plan for the Algoma Forest for the 10-year period April 1, 2010 to March 31, 2020 – Invitation to Participate	Not prescribed	December 5, 2007
010-2101	MNR instrument	Forest Management Plan for the Northshore Forest for the 10-year period April 1, 2010 to March 31, 2020 – Invitation to Participate	Not prescribed	December 10, 2007
010-2600	MNR instrument	Forest Management Plan for the Spanish Forest for the 10-year period April 1, 2010, to March 31, 2020, – Invitation to Participate	Not prescribed	February 1, 2008
010-2789	MNR instrument	Forest Management Plan for the Sudbury Forest for the 10-year period April 1, 2010 to March 31, 2020 – Invitation to Participate	Not prescribed	February 29, 2008
010-2809	MNR instrument	Forest Management Plan for the Algonquin Park Forest for the 10-year period April 1, 2010 to	Not prescribed	March 18, 2008

Registry Number	Type	Title	Ministry's Rationale for Information Notice	Date Published
		March 31, 2020 – Invitation to Participate		
Ministry of Northern Development and Mines				
Amendments to Mine Closure Plans				
010-0382	MNDM instrument	Amendment to the Agrium KPO Closure Plan, 1998	Not prescribed	June 4, 2007
010-0521	MNDM instrument	Amendment to the Dona Lake Mine Closure Plan for Tailings Claims	Not prescribed	June 4, 2007
010-1951	MNDM instrument	Bell Creek Mine. Goldcorp Canada Ltd.	Not prescribed	October 31, 2007
010-1952	MNDM instrument	Bell Creek Mine. Goldcorp Canada Ltd./PJV	Not prescribed	October 31, 2007
010-2114	MNDM instrument	Citadel Gold Mine Closure Plan Amendment	Not prescribed	November 19, 2007
010-2529	MNDM instrument	Amendment to the Crean Hill Mine Closure Plan, Part I,	Not prescribed	January 15, 2008
010-2531	MNDM instrument	Amendment to the Copper Cliff North Mine Closure Plan, Part I, Dated November 2007.	Not prescribed	January 15, 2008
010-2536	MNDM instrument	Closure Plan for the Penhorwood Mine and Concentrator Facility	Not prescribed	January 15, 2008
010-2604	MNDM instrument	Amendment to the Musselwhite Mine Closure Plan	Not prescribed	January 29, 2008
010-2745	MNDM instrument	Macassa and Lakeshore Gold Properties Mine CP	Not prescribed	February 13, 2008
Ministry of Public Infrastructure Renewal				
010-1537	PIR Policy	Proposed Final Built Boundary for the Growth Plan for the Greater Golden Horseshoe, 2006 (Technical Paper – Fall 2007)	Ministry not yet prescribed	November 20, 2007
010-2236	PIR (on behalf of ORC)	Ontario Realty Corporation Planning Approvals and Class Environmental Assessment Invitation to Participate	Ministry not yet prescribed	March 20, 2008
Ministry of Transportation				
010-0724	MTO ToR	Environmental Assessment Terms of Reference for the GTA West Transportation Corridor	section 32 exception - *EAA*	June 15, 2007
010-2234	Metrolinx policy	Regional Transportation Plan for the Greater Toronto and	Metrolinx not prescribed	December 7, 2007

Registry Number	Type	Title	Ministry's Rationale for Information Notice	Date Published
		Hamilton Area (GTHA) – Green Paper #1: Towards Sustainable Transportation		
010-2697	Metrolinx policy	Regional Transportation Plan for the Greater Toronto and Hamilton Area (GTHA) – Green Paper #3: Active Transportation	Metrolinx not prescribed	February 11, 2008
010-2696	Metrolinx policy	Regional Transportation Plan for the Greater Toronto and Hamilton Area (GTHA) – Green Paper #2: Mobility Hubs	Metrolinx not prescribed	February 25, 2008
010-2828	Metrolinx policy	Regional Transportation Plan for the Greater Toronto and Hamilton Area (GTHA) – Green Paper #5: Moving Goods and Services	Metrolinx not prescribed	February 25, 2008
010-2824	Metrolinx policy	Regional Transportation Plan for the Greater Toronto and Hamilton Area (GTHA) – Green Paper #4: Transportation Demand Management	Metrolinx not prescribed	February 26, 2008
010-2903	Metrolinx policy	Regional Transportation Plan for the Greater Toronto and Hamilton Area (GTHA) – Green Paper #6: Roads and Highways	Metrolinx not prescribed	March 3, 2008
010-2912	Metrolinx policy	Regional Transportation Plan for the Greater Toronto and Hamilton Area (GTHA) – Green Paper #7: Transit	Metrolinx not prescribed	March 4, 2008

SECTION 3

USE OF EXCEPTION NOTICES

SECTION 3: USE OF EXCEPTION NOTICES

3.1 Use of Exception Notices

In certain situations, the *EBR* relieves prescribed Ontario ministries of their obligation to post environmentally significant proposals on the Registry for public comment.

There are two main instances in which ministries can post an "exception" notice to inform the public of a decision and explain why it was not posted for public comment. First, ministries are able to post an exception notice under section 29 of the *EBR* when the delay in waiting for public comment would result in danger to public health or safety, harm or serious risk to the environment, or injury or damage to property (the "emergency" exception). Second, ministries can post an environmentally significant proposal as an exception notice under section 30 of the *EBR* when the proposal will be or has already been considered in another public participation process that is substantially equivalent to the requirements of the *EBR* (the "equivalent public participation" exception).

During the 2007/2008 reporting year, ten exception notices were posted, all of them by the Ministry of the Environment (MOE). In five of the cases, MOE relied on the "emergency exception" to notify the public about two orders, two Certificates of Approval and a regulation (which requires schools to flush their water lines to remove lead from the drinking-water) that required immediate action. The ECO believes that all of these notices were acceptable uses of the section 29 emergency exception.

MOE also posted five exception notices that relied on the "equivalent public participation" exception. However, the ECO does not believe that these were appropriate uses of the exception provisions provided in the *EBR*.

The ECO is pleased, however, that all ministries reduced their reliance on exception notices during this reporting year as compared to past years.

MOE's Use of the "Equivalent Public Participation" Exception:
In June 2007, MOE posted three proposal notices on the Registry relating to three Permits to Take Water (PTTWs) issued to DeBeers Canada Limited for its Victor Diamond Mine in northern Ontario. The ministry provided a 30-day comment period for each proposal. A month later, the ministry removed the proposal notices, stating that the original posting of these notices was an error, and reposted the PTTWs as exception notices. This reversal in approach resulted in a loss of public participation rights otherwise provided by the *EBR*, including the loss of third-party appeal rights for the public.

MOE stated that it was relying on the section 30 "equivalent public participation" exception because the Victor Diamond Mine project had already been considered under the *Canadian Environmental Assessment Act* (*CEAA*) process. In late 2007, MOE posted two more exception notices on the Registry relating to two Certificates of Approval (Cs of A) for sewage works issued to DeBeers for the Victor Diamond Mine, applying the same rationale.

The ECO wrote to MOE noting our disagreement with the ministry's view that the PTTWs and Cs of A did not need to be posted as proposal notices. Firstly, the ECO noted that, unlike the exception that is provided in section 32 of the *EBR* for instruments that are a step towards implementing a project approved under the provincial *Environmental Assessment Act*, there is no similar *EBR* exception for instruments that relate to projects under the federal *CEAA* process.

Secondly, the equivalent public participation exception in section 30 of the *EBR* does not apply either, as the particular instruments (including the specific terms and conditions in these instruments, such as the pumping rates and duration of the permits) were not specifically considered under the *CEAA* process, and therefore, were not subject to public consultation.

The ECO also stated that MOE's position that it may post exception notices (rather than proposal notices) for instruments, such as PTTWs and Cs of A, that are associated with major environmentally significant projects reviewed under the federal *CEAA* process, could result in a major loss of transparency of government decision-making and an erosion of public rights. The use of exception notices instead of proposal notices removes important requirements otherwise provided by the *EBR* for the ministry to: seek and consider comments, consider its Statement of Environmental Values, demonstrate how it considered the comments received, and provide leave to appeal rights.

The ECO notes that subsequent proposals for instruments related to the Victor Diamond Mine were posted on the Registry by MOE in May 2008 as regular proposal notices, with an opportunity for public comment and appeal. The ECO is pleased with the ministry's change in position.

3.2 All Exception Notices Posted During 2007/2008 Reporting Year

Registry Number	Ministry	Title	Type	Date Published
010-0325	MOE Instrument	Clean Harbors Canada, Inc. (*EPA* s. 31) - All emergency Certificates of Approval for a waste disposal site	Emergency Exception	April 16, 2007
010-0410	MOE Instrument	Waste Management of Canada Corporation (*EPA* s. 27) - Approval for a waste disposal site	Emergency Exception	May 2, 2007
010-0734	MOE Regulation	Schools, Private Schools and Day Nurseries, O. Reg 243/07 (Amendment to O. Reg. 169/03 and Revocation of O. Reg. 173/03)	Emergency Exception	June 7, 2007
010-2113	MOE Instrument	Jim's Trucking Limited (*EPA* s. 136) - Order for performance of environmental measures	Emergency Exception	November 14, 2007
010-2125	MOE Regulation	Trensept Automation Inc. (*EPA* s. 136) - Order for performance of environmental measures. (*EPA* s. 27) - Approval for a waste disposal site	Emergency Exception	November 16, 2007
010-2213	MOE Instrument	De Beers Canada Inc (*OWRA* s. 53(1)) - Approval for sewage works	Equivalent Public Participation Exception	November 27, 2007
010-1090	MOE Instrument	De Beers Canada Inc (*OWRA* s. 34) - Permit to take water	Equivalent Public Participation Exception	December 7, 2007
010-1127	MOE Instrument	De Beers Canada Inc (*OWRA* s. 34) - Permit to take water	Equivalent Public Participation Exception	December 7, 2007
010-1128	MOE Instrument	De Beers Canada Inc (*OWRA* s. 34) - Permit to take water	Equivalent Public Participation Exception	December 7, 2007
010-2366	MOE	De Beers Canada Inc	Equivalent	December 18, 2007

Registry Number	Ministry	Title	Type	Date Published
	Instrument	(*OWRA* s. 53(1)) - Approval for sewage works	Public Participation Exception	

SECTION 4

ECO REVIEWS OF SELECT DECISIONS ON ACTS, REGULATIONS, POLICIES, AND INSTRUMENTS

SECTION 4: ECO REVIEWS OF SELECT DECISIONS ON ACTS, REGULATIONS, POLICIES, AND INSTRUMENTS

Review of Posted Decision:

4.1 Legislative Brownfield Reform

Decision Information:

Registry Number: AF07E0001
Proposal Posted: January 16, 2007
Decision Posted: September 4, 2007
Comment Period: 30 days
Number of Comments: 20
Came into Force: Part on May 17, 2007 (by Royal Assent); Remainder comes into force on a date to be proclaimed

Description

On May 17, 2007, the Ontario government passed the *Budget Measures and Interim Appropriation Act, 2007* (Bill 187), which included changes to Ontario's brownfield legislative regime to address identified barriers to brownfield redevelopment. Bill 187 made brownfield-related amendments to a number of statutes, including the *Environmental Protection Act*, the *Ontario Water Resources Act*, the *Mining Act*, the *Proceedings Against the Crown Act* and the *Escheats Act*, primarily relating to liability issues and the Record of Site Condition (RSC) framework.

Background:
The National Round Table on the Environment and the Economy describes a brownfield as an "abandoned, vacant, derelict or underutilized commercial or industrial property where past actions have resulted in actual or perceived contamination and where there is an active potential for redevelopment." Brownfield lands may need to be cleaned up, or "remediated," before they can be redeveloped. Examples of brownfield sites include abandoned service stations, railway yards, junkyards, dry cleaners, factories, foundries and mills.

Returning brownfield sites to productive use through remediation and redevelopment is desirable from economic, social and environmental perspectives. However, uncertain regulatory requirements, liability concerns associated with contaminated land, and lack of available financing to develop brownfield sites have all been identified as barriers to brownfield redevelopment.

In November 2001, the Ontario government took the first step in a lengthy process to revise Ontario brownfield law and policy with the enactment of the *Brownfield Statute Law Amendment Act* (*BSLAA*). The *BSLAA* made amendments to seven provincial statutes, including the *Environmental Protection Act* (*EPA*), the *Ontario Water Resources Act* (*OWRA*), the *Municipal Act, 2001* and the *Planning Act*. The purpose of the *BSLAA* was to encourage redevelopment of brownfield lands in Ontario by providing clear site assessment and remediation requirements, environmental liability protection for those involved in brownfield redevelopment, and planning and financial tools to facilitate the brownfield redevelopment process.

The *BSLAA* added a new Part to the *EPA*, Part XV.1 – Records of Site Condition. *EPA* Part XV.1 established a regime for site assessment and clean-up, including clear requirements for site assessment methodology and qualifications of persons conducting site assessments. *EPA* Part XV.1 enshrined the Record of Site Condition (RSC) as a voluntary and, in specified circumstances, mandatory tool for confirming the environmental condition of a property at a specific point in time. An RSC is a document prepared by a qualified person and filed with the Ministry of the Environment (MOE) that certifies the property has been assessed and meets the soil, sediment and groundwater standards applicable to the use of the property. The *BSLAA* mandated the creation of the electronic Environmental Site Registry

(ESR) for providing public notice of RSCs filed with the Ministry of the Environment (MOE). The *BSLAA* also provided immunity from certain environmental orders for owners of sites for which RSCs are filed on the ESR. The ECO reviewed the *BSLAA* in our 2001-2002 Annual Report (page 83). In the Supplement to our 2002-2003 Annual Report (page 86), the ECO reviewed two regulations related to provisions in the *BSLAA* that apply to municipalities, creditors, receivers, trustees in bankruptcy and fiduciaries: O. Reg. 298/02 under the *EPA* and O. Reg. 299/02 under the *OWRA*.

In October 2004, the Record of Site Condition regulation (O. Reg. 153/04) made under the *EPA* came into force. Ontario Reg. 153/04 sets out requirements for conducting site assessments and defines who may be a "qualified person" (QP) for purposes of conducting site assessments and making RSC certifications. Ontario Reg. 153/04 replaced the MOE 1996 publication "Guideline for Use at Contaminated Sites in Ontario" and prescribed remediation standards and methodology for purposes of filing an RSC. Ontario Reg. 153/04 also establishes detailed requirements for completing and filing an RSC. Coming into full effect on October 1, 2005, O. Reg. 153/04 completed the implementation of the brownfield regime established by the *BSLAA*. The ECO reviewed O. Reg. 153/04 in our 2004-2005 Annual Report (page 91).

2007 Legislative Brownfield Reform Package:
Despite the progress that the government has made to create a regulatory environment more conducive to brownfield redevelopment, stakeholders have continued to voice concerns about barriers to brownfield redevelopment in Ontario. The government has recognized that bringing brownfield lands "back into productive use is an important objective not only for the health and safety of Ontarians, but also for the successful implementation of the Growth Plan in the Greater Golden Horseshoe and more intensified development province-wide," and has acknowledged that a number of issues relating to liability, financing and the regulatory process have been identified as barriers to brownfield redevelopment.

Bill 187 implements the components of brownfield legislative reforms developed by the Ministries of the Environment, Municipal Affairs and Housing, Northern Development and Mines and the Attorney General. The Bill 187 amendments fall roughly into two categories: liability issues, and RSC regulatory framework issues. The government indicated in the September 2007 Registry decision notice that it expected to develop regulations and programs related to Bill 187, including amendments to O. Reg. 153/04, within 18 months, with draft regulations to be available for comment in late 2007 or early 2008. As of August 1, 2008, no draft regulations were posted.

The Registry proposal notice clarified that the amendments were not intended to address all identified barriers to brownfield redevelopment. The government has indicated that additional potential changes will be the subject of further Registry postings and consultations.

Amendments Related to Liability:
The risk of regulatory and civil liability associated with contaminated land is one of the most significant issues preventing redevelopment of brownfield sites. Many of the brownfield amendments made under Bill 187 were intended to address some of these liability risks.

Protection from Orders after Filing a Record of Site Condition:
Prior to this decision, under *EPA* Part XV.1, property owners who filed RSCs for their properties on the ESR were provided with limited immunity from some environmental orders under the *EPA*. However, the protection from orders did not apply in specified circumstances, commonly referred to as "RSC re-openers." Stakeholders argued that the broad scope of available RSC re-openers created uncertainty about the liability risks associated with brownfield redevelopment. In response, Bill 187 included four categories of amendments relating to RSC re-openers:

1) "False or misleading" – The re-opener for RSCs containing false or misleading information was amended to clarify that it also applies to a false or misleading certification.

2) Off-Site migration from the RSC property – Previously, off-site migration of any amount of contaminants after the RSC certification date constituted an RSC re-opener. Amendments

include a lengthy new section that identifies circumstances in which off-site migration will no longer trigger an RSC re-opener. Briefly, the re-opener will not apply if the contaminant that has migrated does not exceed the applicable site condition standard of the RSC property or the site condition standard for any sensitive property use located or permitted within the vicinity of the RSC property. To take advantage of the liability protection, the qualified person must certify in the RSC whether there is any sensitive property use located or permitted within the vicinity of the RSC property. The liability protection does not apply to a person who, before the certification date, caused the contamination. These new off-site migration rules are not yet in force. Regulations are needed to set out implementation details including dates and definitions of key terms. The decision notice states that implementation details will be a matter for future consultation once the regulatory amendments are drafted.

3) Change in Use – Previously, if the use of an RSC property changed from the use specified in the RSC, protection from orders was lost unless specified circumstances existed. As a result of Bill 187, this re-opener will only apply to the person who causes or permits the change in use and who owns, occupies or has charge, management or control of the property at the time of the change of use.

4) Failure to carry out a required risk management measure – Previously, protection from orders was not available if risk management measures required under a certificate of property use (CPU) or a risk management order were not complied with. A Bill 187 amendment provides that where there has been off-site migration of contaminants as a result of the failure to comply with a CPU or risk management order, only the person who has failed to comply loses the protection from orders.

Current Owner:
Amendments to provisions in the *EPA* and the *OWRA* providing that emergency orders may be issued where contaminants present a danger to health or safety clarify that such orders may only be issued to the current owner of the property (and not to former owners).

Liability Protection for Those Undertaking Remediation Work:
Prior to Bill 187, the *EPA* and the *OWRA* provided that a person who conducted a site investigation at a property was not, for that reason alone, subject to *EPA* and *OWRA* orders relating to the property. Bill 187 extended this provision to apply to "a person who takes any action to reduce the concentration of contaminants on, in or under a property."

"Good Samaritan" Mine Rehabilitation:
Amendments to the *Mining Act* provide protection from specified *EPA* and *OWRA* orders for those who voluntarily rehabilitate abandoned mine hazards on Crown lands. Rehabilitation must be conducted in accordance with prescribed standards, including the Mine Development and Closure regulation and the Mine Rehabilitation Code. Proponents must first obtain approval from the Ministry of Northern Development and Mines. The manner in which an application to rehabilitate a mine hazard must be made will be prescribed by regulation.

Municipal Reliance on RSCs:
Prior to Bill 187, the *EPA* provided immunity to the Crown and its employees from civil liability for inaccurate RSCs filed in the ESR. Amendments to the *EPA* extend this immunity to municipalities and conservation authorities who rely on RSCs in the issuance of building permits, exercise of power under the *Planning Act*, and other prescribed actions.

Horizontal Severance:
Horizontal severance of land, which is permitted under the *Planning Act*, was originally conceived in the mining context. Horizontal severance permits continued ownership and use of surface lands by one person while permitting simultaneous mineral extraction from the subsurface by another. Recently, horizontal severance has been used as a tool to facilitate brownfield redevelopment by severing the surface of a property from contaminated land below the surface, thus protecting a purchaser of the

surface land from liability for historic subsurface contamination. Concerns were raised that horizontal severances were being used to transfer contaminated subsurface lands to shell corporations with no assets, and ultimately to abandon the contaminated land. Consequently, the *EPA* now specifically requires that environmental site assessments conducted under the brownfield regime address the "land or water on, in or under the property," thus capturing both surface and severed subsurface parcels. Further, the amendments provide that the RSC re-opener for off-site migration will apply to the full vertical column of land, regardless of legal ownership of the upper and lower layers.

Escheats:
A property "escheats," or passes, to the Crown when the property is abandoned. Abandonment occurs when a corporation that owns property is dissolved, or when a property owner dies intestate and without heirs. If the Crown takes possession or control of an escheated property, the Crown is exposed to liability. Further, any money the Crown expends on the escheated property may ultimately benefit private interests if the property subsequently reverts to its original owner or is seized. Amendments made to the *Proceedings Against the Crown Act* protect the government from civil liability for taking steps on escheated land to ensure that public interest and safety is protected. Amendments to the *Escheats Act* provide the Crown with a priority lien for costs incurred by the Crown to improve or make the property safe. These amendments are intended to alleviate liability and economic risks that may otherwise dissuade the Crown from taking action to address contamination on escheated property.

Amendments to the RSC Regulatory Framework:
RSC Pre-filing Review: To respond to concerns about lack of certainty in the RSC filing and auditing process, as well as concerns about the quality of information contained in RSCs, amendments were made to the *EPA* to create a new RSC submission and filing process. Under the old process, the MOE did not review RSCs before they were filed. Any MOE review, or audit, of an RSC was conducted after the RSC was already filed and posted on the ESR. This process resulted in concerns that planning and development approvals or financing would be delayed for indefinite periods of time even after an RSC was filed, if that RSC was later subject to an MOE audit.

The new two-step process will require the RSC to be "submitted for filing" before it is actually filed. Once the Director has determined that all of the required information has been submitted, the Director will issue a notice of receipt of the RSC. The Director will then, within a prescribed period of time, give notice to the person who submitted the RSC of one of the following:

- the RSC can not be filed because it has not met all regulatory requirements;
- the Director intends to conduct a pre-filing review of the RSC; or
- the RSC has been filed.

If a pre-filing review is conducted, the Director may give notice of a defect prescribed by the regulations, or give a written acknowledgment that the RSC has been filed on the ESR. If the RSC contains a defect, the person who submitted the RSC may submit additional information or a new RSC. Once the Director is satisfied that there is no longer a defect, the Director will give a written acknowledgment that the RSC has been filed on the ESR. The ministry has indicated that the details of implementation of this new pre-filing process will be a matter for future *EBR* consultation.

Qualified Persons:
Bill 187 amends the regulation-making authority under the *EPA* to support potential changes to the qualified person regime. The amendments permit regulations to be made that prescribe an approval process for qualified persons, including the power to impose terms and conditions on an approval, and specifying a person or body to grant approval of a qualified person. Further, there is new regulation-making authority to provide for revocation or suspension of an approval of a qualified person, and a corresponding appeal process.

Other Amendments:
Amendments to the *EPA* to address some "technical issues associated with the RSC Framework" include:

- a new provision permitting the correction of prescribed types of errors in an RSC in prescribed circumstances;
- a new provision requiring notice of RSC re-opener orders to be filed on the ESR, and requiring notice of compliance with the orders to be filed;
- extension of the RSC report retention requirements to apply not only to the qualified person, but also to the property owner who filed or submitted the RSC for filing; and
- revisions to the regulation-making authority relating to soil management on a property for which an RSC has been filed.

Implications of the Decision

There are an estimated 30,000 – 100,000 brownfield sites in Canada. It has been estimated that 40 per cent of Canada's potentially contaminated sites are located in Ontario. Redevelopment of brownfield sites is beneficial to the environment not only because it may lead to improved soil, water and air quality, but because re-use of these sites contributes to urban revitalization and curbs sprawl development that would otherwise consume valuable green space, including agricultural lands. It has been estimated that for every one hectare of brownfield land used for redevelopment, 4.5 hectares of greenfield land are saved. This decision is part of an incremental process of legislative reform that should encourage redevelopment of brownfield sites in lieu of greenfield development.

As discussed in the ECO's 2004-2005 Annual Report, there are three recurring themes underlying concerns with brownfield law and policy in Ontario: liability, certainty, and accountability. The amendments made by Bill 187 should alleviate some of the specific concerns relating to liability, certainty and accountability in Ontario's brownfield regime that act as barriers to brownfield redevelopment.

Liability:

Liability risk is considered to be one of the greatest obstacles to brownfield redevelopment. Prospective purchasers, developers, banks, municipalities and others may be reluctant to get involved in brownfield redevelopment projects because of the liability risks associated with doing so. In Ontario, anyone who has ownership, possession, charge, management or control of contaminated land may face civil and regulatory liability related to the contamination. While the RSC regime created by the *BSLAA* provided immunity from a range of administrative orders to those who file an RSC on the ESR, no immunity was provided from civil liability or prosecution. Further, the broad scope of RSC re-openers in *EPA* Part XV.1 meant that even those who filed RSCs were at risk of being issued orders in a number of circumstances.

The Bill 187 amendments will serve to diminish liability risks for those who are involved in brownfield redevelopment projects. The impact of limiting the scope of the off-site migration RSC re-opener is considerable, as compliance with *EPA* and *OWRA* orders can be very costly. However, these amendments still do not provide proponents with immunity from prosecution or from civil liability. These amendments have potentially negative implications for neighbouring property owners, who will no longer be able to rely on the regulator to take action when contaminants below specified criteria migrate from RSC properties to neighbouring properties.

As a result of the Bill 187 amendments, those who carry out remediation activities at a property will not, by reason of the fact of their involvement with the property alone, become liable for *EPA* or *OWRA* orders. This last amendment will likely send a reassuring signal to and have beneficial implications for the environmental consulting industry, particularly in light of the chill that was cast by the 2006 New Brunswick Court of Queen's Bench decision in *R. v. Gemtec Limited*, in which an environmental consultant was convicted of a *Fisheries Act* violation relating to the consultant's remediation work at a former municipal landfill site.

The amendments to the *EPA* requiring that environmental site assessments and off-site migration RSC re-opener rules apply to the "land or water on, in or under the property" will make it more difficult to use horizontal severance as a tool to facilitate redevelopment of a property under the RSC regime. As a result of this decision, while an innocent purchaser of the surface lands may avoid civil and regulatory liability for subsurface contamination by never taking legal title to the subsurface lands, the severed subsurface lands must now also be assessed and must meet the prescribed criteria in order for the owner of the surface lands to obtain an RSC and to enjoy the attendant protections from liability. These amendments will prohibit arrangements that would permit a purchaser of the surface lands to finance and develop the surface lands based on an assessment of the surface lands alone, while leaving the contaminated subsurface lands unassessed and unremediated in the hands of a separate legal owner. These amendments will prevent owners of contaminated lands from "abusing" horizontal severance by selling the surface lands and then abandoning the contaminated subsurface portion. However, these amendments may discourage development of brownfield sites for which horizontal severance would previously have been a tool to make the project feasible. The amendments will also have the effect of inextricably linking legally separate parcels of land for RSC purposes, potentially tying the hands of the owner of one parcel if the owner of the second parcel is not cooperative.

Amendments permitting municipalities, Conservation Authorities and their respective officers, employees or agents to rely on RSCs without the risk of civil liability if the RSC is inaccurate bring municipalities and Conservation Authorities in line with the immunity provided to the Crown for relying on RSCs. The effect of this amendment may be that municipalities and Conservation Authorities will be less reluctant to issue planning and building approvals based on RSCs without first obtaining independent peer reviews, thus minimizing approval delays and facilitating the process of redeveloping brownfield sites.

The amendments to the *Escheats Act* and the *Proceedings Against the Crown Act* may encourage the Crown to take action in relation to contaminated lands that have escheated to the Crown, where previously the Crown may have been reluctant to do so. With an estimated 10,000 or more escheated sites in Ontario, an unknown number of which may be contaminated, these amendments could result in remedial action on a number of properties that would, previously, have remained contaminated and abandoned.

The mineral industry has long indicated its interest in helping the Crown remediate abandoned mine sites, but cites the risk of environmental liability associated with those sites as a barrier to engaging in remediation projects. The protection from specified *EPA* and *OWRA* orders for those who voluntarily undertake "good Samaritan" mine rehabilitation projects should address this concern and assist in facilitating the rehabilitation of mine hazards at some of the estimated 5,600 known abandoned mine sites in Ontario containing over 16,500 individual features. Given the estimated total cost of $500 million to rehabilitate these sites, the environmental benefit of encouraging those who are willing to invest in mine rehabilitation could be significant. The effectiveness of this provision will likely depend in part on the details of the approval process for rehabilitation plans, to be developed by regulation. The ECO is not aware if proposals for approvals to rehabilitate mining hazards issued under section 139.2 of the *Mining Act* will be prescribed as instruments under O. Reg. 681/94 of the *EBR*.

Certainty:
The extension of available immunity from liability under the RSC regime, discussed above, will generally enhance the level of certainty of the RSC process by minimizing the degree of risk assumed by those who engage in brownfield development projects.

The new RSC pre-filing review process also has the potential to create greater certainty in the RSC regime, which may encourage more landowners, developers and financers to become involved in brownfield projects. For example, clearly defined timelines for the MOE to carry out its pre-filing responsibilities would make the process more predictable. Consistent pre-filing review of RSCs may also enhance the quality of information filed on the Registry, and confidence in the RSC regime. However, if the MOE continues its practice of auditing selected RSCs after they are filed, the pre-filing process may merely add an extra step without reducing uncertainty for the parties involved.

Accountability:
New provisions in the *EPA* and *OWRA* requiring notice to be given on the ESR of a broader range of regulatory orders issued in relation to an RSC property, as well as notice of compliance of any such orders, will result in more complete and up-to-date information about an RSC property being made available to the public. Provisions permitting the correction of some types of errors in an RSC (beyond

typographical or clerical errors, which were already permitted to be corrected) will similarly provide greater transparency regarding a particular property. The utility of this enhanced information in the hands of the public may be limited, however, as reliance on information posted on the ESR is at the user's peril, and the MOE continues to caution users to conduct their own due diligence.

The new regulation-making authority over the approval process for qualified persons could provide a more substantive framework governing qualified persons permitted to conduct site assessments and make RSC certifications. A more substantive qualified person framework could enhance public confidence in the RSC regime by better regulation of the individuals permitted to carry out site assessments and make RSC certifications. An appeal process related to qualified person approval, assuming such an appeal would be made to the Environmental Review Tribunal, may also provide some opportunity for public involvement.

Public Participation & *EBR* Process

On January 16, 2007, in response to concerns about ongoing barriers to brownfield redevelopment in Ontario, MMAH posted a proposal notice on the *EBR* describing the components of legislative brownfield reform being considered by MMAH, MOE, MNDM and the Attorney General. The proposal notice summarized the details of various legislative amendments under contemplation.

The proposal notice provided a 30-day comment period. Twenty written comments on the proposal notice were received, including a letter submitted jointly by 16 stakeholder organizations. The government, through the Office of the Brownfields Coordinator and staff from various ministries, also consulted with the Brownfield Stakeholder Group, an assemblage of municipalities, lenders, developers and professional and environmental organizations experienced in dealing with brownfield challenges and opportunities.

In addition to making substantive comments on the proposal (discussed below), commenters urged the government to take quick action by placing brownfield reform on the legislative agenda for the spring 2007 session. However, some of those commenters and others also indicated their expectation that they would have an opportunity to provide further comments once the details and wording of the proposed legislative changes were developed. Some commenters noted that certain aspects of the proposal were vague or overly broad and that it was difficult to comment without more specific details about those aspects of the proposal.

Instead, brownfield legislative reform provisions were drafted into Bill 187, the *Budget Measures and Interim Appropriation Act, 2007*, which received first reading on March 22, 2007. Notice of the brownfield reform provisions in Bill 187 was not required to be posted for public comment due to an exemption under the *EBR* section 33 for proposals that form part of a budget, details of which, by parliamentary convention, must not be released before the budget is tabled in the Legislature. The bill received second reading on April 17, 2007, and was referred to the Standing Committee on Finance and Economic Affairs where some changes to the bill were made.

At the ECO's prompting, MMAH voluntarily posted an information notice on May 3, 2007 (*EBR* Registry number 010-0365) that described the brownfield reform package contained in Bill 187. The information notice was posted after the bill was referred for third reading. The information notice included links to the original *EBR* proposal notice and to other background documents on Bill 187. Some of the brownfield-related amendments contained in the bill were not addressed in the *EBR* proposal notice. However, no further opportunity for public comment or consultation was provided.

Bill 187 received Royal Assent on May 17, 2007. A decision notice was posted on September 4, 2007.

Summary of Comments:
Comments were received from a range of industrial and professional associations, municipalities, consultants, and environmental non-governmental organizations (ENGOs). Stakeholders were, on the whole, generally supportive of the proposed legislative changes, referring to them, for example, as "important steps in the right direction" and "address[ing] a number of key issues." In particular, a letter

endorsed by sixteen organizations expressed general support for the "intent and direction of the legislative changes proposed at this time." However, most commenters expressed significant concerns about specific components of the proposed changes, such as changes to off-site migration re-openers, the proposed ban on horizontal severances, and the proposed RSC pre-filing process. Many commenters also identified additional issues for brownfield reform that were not addressed in the proposal notice.

Protection from Orders after Filing a Record of Site Condition:
In response to the proposal to clarify the "false or misleading" RSC re-opener, the comments received were generally positive but indicated some ongoing uncertainty about the meaning of "false or misleading." The National Brownfields Association commented that the re-opener should be limited to cases of intentional misrepresentation because "inaccurate" has too broad a meaning given inherent uncertainties in the RSC system. The National Brownfields Association suggested using the term "fraud or incompetence on the part of the QP" instead. A development company expressed concern that, as a result of the amendment, RSC property owners would be required to "go behind the [RSC] certification and make their own assessment of its veracity" to ensure that RSC certifications by qualified persons were not false or misleading. The Canadian Bankers Association commented that the potential for false or misleading information in RSCs would continue "as long as a mechanism establishing stricter standards for qualified persons, supported by frequent, consistent and transparent enforcement of such standards, does not exist."

Commenters were enthusiastic about limiting the scope of RSC re-openers for off-site migration, with the exception of two ENGOs, the Canadian Institute for Environmental Law and Policy (CIELAP) and the Canadian Environmental Law Association (CELA). CIELAP and CELA jointly submitted that providing liability protection related to off-site migration is unacceptable as a matter of public policy and would "undermine the incentive for parties undertaking a clean-up to take the appropriate measures to prevent off-site contamination." CIELAP and CELA stated that the benefit of promoting brownfield redevelopment was outweighed by the expense of allowing an increase of off-site contamination.

Other commenters identified concerns with the proposed approach to limiting the RSC re-opener for off-site migration, particularly in the context of implications to neighbouring property owners. The Ontario Bar Association's Environmental Law Section (OBA ELS) commented that no liability protection should be available in cases where off-site migration contributes to existing contamination on a neighbouring property such that an exceedance is created at the neighbouring property. The OBA ELS also stated that potable site condition standards should be used unless the RSC property and neighbouring properties satisfy the requirements to use non-potable criteria under O. Reg. 153/04. The National Brownfields Association identified a need to clarify what would happen if there was an Official Plan amendment or a rezoning of a property in the vicinity to permit a more sensitive use after an RSC was filed.

Several commenters identified the need for clear definitions of "sensitive property uses" and "within the vicinity of the property." Commenters suggested that sensitivity of a property use should be determined based on permitted ("as of right") uses rather than current use. Other commenters expressed concern that the proposed approach of reviewing surrounding land uses would go beyond the regular skill set of some qualified persons. The Canadian Petroleum Products Institute cautioned that a broad definition of "vicinity" would increase the cost of compliance and inhibit brownfield development. Finally, some commenters suggested that the liability protection should be extended to apply to RSCs that are based on criteria developed under risk assessment, and that immunity should be extended to include protection from civil liability for those who are not responsible for the contamination.

Good Samaritan Mine Rehabilitation:
The Ontario Mining Association (OMA) welcomed the proposal to remove liability barriers to voluntary mine rehabilitation work, and commented specifically on two aspects of the proposal. First, the OMA expressed concern that the characterization of "Good Samaritans" as "those who did not cause the contamination originally" could exclude companies with any historical link to the ownership of an old mining property, and commented that "such a connection should not negate Good Samaritan efforts entered into in good faith." Second, the OMA stated that a proponent should be required to obtain the

Ministry of Northern Development and Mines' agreement that a proposed mine rehabilitation project is in accordance with the relevant regulations. This would avoid disputes between MNDM and the proponent, after the work has commenced, based on differing interpretations of the Mine Rehabilitation Code and other regulations.

Municipal Reliance on RSCs:
Municipalities and other commenters supported the proposal to protect municipalities and conservation authorities from civil liability for relying on RSCs in the issuance of building permits and other planning approvals, and encouraged the drafting of a clear and broad immunity to cover various liability situations that could arise.

Horizontal Severance:
The proposal notice originally proposed to ban horizontal severances altogether. Most commenters expressed strong opposition to the proposed ban, referred to by one as a "retrograde step" and by another as "unwarranted," on the basis that such a ban would remove a tool that has been successfully used to facilitate brownfield redevelopment. Some commenters agreed that there is a need to close loopholes to prevent abuses of horizontal severances that would result in shifting environmental liabilities from the polluter to the taxpayer, but suggested that a balance should be struck between an outright ban and encouraging legitimate brownfield projects to proceed. Some suggestions for achieving such a balance included: requiring *Planning Act* consent for horizontal severances; requiring a consent order to be issued by MOE and securities to be posted for the cost of remediation or risk assessment of the severed lower parcel; and providing for easements requiring support and cooperation between owners of the upper and lower layers for environmental investigation and remediation. Only CIELAP and CELA supported the proposed ban, on the basis that horizontal severances permit parties to avoid responsibility for cleaning up contaminated land and risk contaminating surface and adjacent lands in the future. As a result of the numerous public comments opposing the ban, Bill 187 instead included amendments requiring the full vertical column of a property (regardless of a horizontal severance) to be addressed for RSC purposes.

RSC Pre-filing Review:
Many commenters acknowledged a need to increase certainty and consistency in the RSC filing process. Municipal commenters supported the proposed two-step pre-filing RSC process, on the basis that this should enhance the quality of RSCs that are filed on the ESR and relied on by municipalities in the planning approval process. Other stakeholders believed that the proposed pre-filing process would unnecessarily complicate the regime and result in further delays. Commenters emphasized the need for a simplified, standardized process with "short and enforceable time limits." One consultant referred to the filing of an RSC as an "important milestone" to establish completion of the remediation phase of a brownfield project and underlying legal agreements relating to brownfield projects. The National Brownfields Association recommended that "[t]he RSC review and audit decision process be consistently applied in a standard predefined timeframe such that the RSC is only acknowledged and posted on the Registry when it is not subject to audit (unless there is fraud or incompetence) and any issues with the form of the RSC information are resolved." One commenter expressed concern with MOE's proposal to continue its practice of auditing some RSCs after filing, as this would result in an extra level of process without removing the uncertainty of an RSC being audited after being filed. Other commenters were concerned that a Director's refusal to permit filing of an RSC would not be subject to appeal, with one commenter stating that "[t]he factual record underlying a typical RSC is generally extremely complicated" and that decisions regarding RSC filing should be "subject to oversight by an independent regulator."

Qualified Persons:
Commenters were supportive of a more detailed qualified person framework. One commenter stressed "the importance of enhancing the requirements for qualified persons to define better the education and experience of persons that assume responsibility for projects involving contaminated sites." The Ontario Environment Industry Association (ONEIA) stated that the qualified person registration and re-qualification process "should not be unduly onerous or overly prescriptive, and should take into consideration the broad range of backgrounds that competent practitioners in the field come from." ONEIA also noted the importance of establishing an appropriate process for qualified persons to challenge suspensions or

removals. A municipality suggested that the qualified person framework review should include reconsideration of the insurance provisions applicable to qualified persons.

Other Comments:
Several stakeholders commented that the legislative amendments proposed would not address all barriers to brownfield redevelopment. Commenters offered a number of additional issues for brownfield reform not covered in the proposal, including:

- updating clean-up standards;
- reviewing risk assessment timeframes;
- addressing the use of RSCs for other purposes (for example, by municipalities);
- expanding the scope of people who may be qualified persons;
- expanding the scope of people permitted to file RSCs to include beneficial owners;
- ensuring realistic application and suitability of current laboratory technologies to meet regulatory needs;
- capturing current residential properties with histories of industrial use under the change of use provisions; and
- time-limiting civil liability for non-polluting landowners who file RSCs so that appropriate insurance products may be obtained during that period.

Consideration of Comments:
The decision notice states that all of the written submissions were considered and that "many issues and recommendations raised during the consultation helped to refine the legislative amendments prior to inclusion in Bill 187."

The government clearly reviewed and considered the public's comments, and Bill 187 appears to have been drafted to incorporate some of the comments and suggestions received. For example, in relation to off-site migration reopeners, amendments to the EPA require that the site assessor review not only current uses of properties in the vicinity of the RSC property, but also permitted uses. As another example, in the face of significant opposition to a ban on horizontal severances, the government abandoned that proposal. However, the government instead made changes to site assessment requirements and off-site RSC re-opener eligibility that will have the effect of limiting the use of horizontal severances as a tool to facilitate brownfield projects, and, because they were made through the budget bill, no opportunity for public comment was provided for those alternative changes.

Some noteworthy comments were not addressed by the government; for example, the possibility that an Official Plan amendment or a rezoning of a neighbouring property may be obtained to permit a more sensitive use after an RSC is filed was not addressed. Concerns about the lack of appeal rights relating to RSC filing decisions were also not addressed. Further, the concern that post-filing audits of RSCs may continue despite the new RSC pre-filing review regime was not addressed (although the government has indicated that details of implementation of the pre-filing RSC review process will be a matter for future *EBR* consultation).

Many of the comments received will have ongoing relevance to the implementation details of the Bill 187 amendments, and the ECO encourages the government to continue to consider the comments received as it continues to engage in additional public consultation in developing the regulations to implement the Bill 187 amendments.

SEV

In its SEV Briefing Note, MMAH confirmed that the brownfield amendments are consistent with the two SEV environmental principles considered. MMAH stated that the amendments provide increased regulatory certainty for those involved in remediation and redevelopment of brownfield sites, including new property owners who undertake remediation and municipalities that rely on RSCs in making planning and building decisions. Further, MMAH noted that the amendments are consistent with the "polluter pays principle."

MMAH stated that the new level of certainty provided by the amendments "will remove a significant barrier to brownfield redevelopment" and that the decision will help "to protect and conserve natural resources, plant life, animal life and/or ecological systems because it will help to minimize the unnecessary development of greenfield areas."

Other Information

In fall 2007, MMAH released a plain-language guide entitled "A Practical Guide to Brownfield Redevelopment in Ontario." The guide incorporates the amendments to the brownfield regime that were made under Bill 187. The aim of the guide is to "provide an understanding of the benefits of brownfield redevelopment and guidance on the process for remediation and redevelopment in Ontario." The guide can be accessed online from the ministry's website: http://www.mah.gov.on.ca.

MOE is considering an update of the soil and groundwater standards established under O. Reg. 153/04. This would involve revision to the document entitled "Soil, Groundwater and Sediment Standards for Use Under part XV.1 of the *Environmental Protection Act*" that sets out the tables of criteria used by site assessors to evaluate and remediate sites and to prepare RSCs. On March 23, 2007, MOE posted a proposal notice on the Registry for a 60-day comment period (*EBR* Registry number 010-0149). The basis for the proposal was that "[t]here is now a need to review the standards setting models and criteria and update them with current science." The proposal attracted significant attention from a range of stakeholders, including concern that the proposed new criteria were too stringent for laboratory analysis. The ministry has indicated that it has reviewed the *EBR* comments and external expert peer review comments, and is considering modifications to the proposed standards. As of August 2008, a revised proposal has not been posted on the Registry.

On April 1, 2008 the section in O. Reg. 153/04 governing qualified persons was revoked and replaced with new provisions governing who may be a qualified person for purposes of the *EPA*. Under the new provisions, which will come fully into force on October 1, 2009, the only professionals qualified to certify an RSC are members in good standing with the Association of Professional Geoscientists of Ontario or the Professional Engineers of Ontario. In addition, in force as of April 1, 2008, persons holding a limited licence under the *Professional Engineers Act* or holding a certificate of registration under the *Professional Geoscientists Act, 2000* who are limited members of the Association of Professional Geoscientists of Ontario are also able to certify a RSC and will be able to do so indefinitely. These amendments were made following public consultation on a proposal notice posted on the Registry on January 25, 2008 (*EBR* Registry number 010-2364). The ECO may review this decision in a future Annual Report.

ECO Comment

The key challenge underlying brownfield law- and policy-making is the need to strike a balance: eliminating obstacles to getting involved in brownfield projects, while still protecting the environment and the broader public interest. Overall, the ECO believes that Ontario's efforts to revise and refine its brownfield laws and policies through Bill 187 strike this balance.

The ECO is pleased that the government is taking steps to further reduce the liability burden on those involved in brownfield redevelopment projects. In our 2004-2005 Supplement, the ECO specifically noted the need to minimize liability risks associated with off-site migration of historical contamination once a property owner files an RSC (page 94). The new rules for off-site migration significantly narrow the application of the RSC re-opener to cases where there is risk of harm to the environment or surrounding property uses. The new rules also make a greater distinction between polluters and non-polluters. However, some gaps in the amendments may result in unintended consequences for neighbouring property owners and should be reviewed in the next phase of brownfield legislative reform. The ECO also encourages the government to further clarify the meaning of "false or misleading."

The ECO supports the new regulatory liability protection for consultants who engage in brownfield remediation and civil liability protection for municipalities and Conservation Authorities who rely on RSCs, which will also reduce liability barriers to brownfield redevelopment.

The Bill 187 amendments do nothing to relieve civil liability risks for proponents of brownfield projects, referred to by some as the "liability chill" over brownfield redevelopment. In our 2001-2002 Annual Report (page 106), the ECO encouraged the ministry to consider suspending civil liability temporarily for those engaged in brownfield measures. In our 2004-2005 Annual Report (page 93), the ECO stated that the MOE should examine approaches taken to reduce civil liability risks in other jurisdictions to determine whether they could be adopted in Ontario. A study commissioned by MOE in 2006 concluded that legislation granting relief from third-party civil liability to promote brownfield redevelopment has been largely rejected by most national and state governments in the United States, the United Kingdom and Australia. One jurisdiction's policy reason for not providing civil liability relief was that such relief is unnecessary because existing common law rules strike a "reasonable balance." In jurisdictions where civil liability relief is provided, it is generally only available in narrowly defined circumstances, and the scope of the liability relief is often "frustratingly poorly thought through," with "little attention to the consequences of limiting third party rights."

However, in 2003 the National Roundtable on the Environment and the Economy developed recommendations for "Establishing an Effective Public Policy Regime for Environmental Liability and Risk Management" and set out a number of ways to control civil liability risks to encourage brownfield redevelopment. In 2006, the Canadian Council of Ministers of the Environment (CCME) published a model framework for approaching contaminated site liability issues in Canada, including a number of recommended policy principles that should underlie brownfield liability legislation, some of which could apply to civil liability issues. The ECO continues to encourage MOE to consider ways to limit civil liability as part of Ontario's brownfield redevelopment regime.

The ECO questions whether the amendments aimed at preventing abuse of horizontal severances will benefit the environment. Horizontal severance was a tool that innocent purchasers could use to redevelop brownfield lands while protecting them from civil and regulatory liability for subsurface contamination that they did not cause. Owners of the subsurface contaminated lands can not avoid all responsibility by abandoning or conveying the property to a shell corporation, as former owners have continuing statutory and civil liability. While the ECO supports the government's efforts to ensure the full vertical columns of properties are assessed and to prevent abandonment of contaminated lands, the ECO is concerned that the ultimate effect of these amendments may simply be that fewer brownfield sites will be returned to productive use. The ECO encourages the government to consider alternate approaches, including those suggested by commenters, that will protect the environment and public interest without discouraging legitimate brownfield redevelopment initiatives.

The amendments to the *Mining Act* to promote voluntary mine rehabilitation are laudable. The ECO encourages MNDM to develop regulations governing the approval process for mine rehabilitation plans that will provide a clear and predictable process for prospective "good Samaritans."

The ECO is also pleased that the quality and scope of information to be posted on the ESR will be enhanced through the RSC pre-filing review process, corrections to RSCs and notices posted by the Director. It is important for Ontarians to have access to the best available information on the state of properties for which RSCs have been filed, including any ministry action in relation to those properties. Although the amendments represent a boost to post-filing transparency, the ECO has continuing concerns about the lack of public consultation required by proponents leading up to the filing of an RSC on the ESR.

Development of an RSC pre-filing regime that enhances confidence and predictability in the process is commendable. Whether the new regime will accomplish its intended purpose will depend on the details of its implementation, particularly those related to timeframes and deadlines. The ECO is concerned that the new RSC pre-filing regime, which will more closely resemble other MOE approval processes, will result in delays to RSC filings unless MOE has adequate resources available to efficiently and effectively administer the process. The ECO is also concerned that proponents will not have the right to appeal RSC decisions; while removal of automatic filing of RSCs may enhance RSC quality, the new discretionary filing process (based on a Director's identification of as-yet unprescribed "defects") may need to be balanced with appropriate appeal rights. The ECO is also concerned that if the MOE continues its practice of conducting routine post-filing audits of some RSCs, the certainty gained via the new process may be lost.

Despite the progress that has been made by this decision, the ECO is concerned about the manner in which the amendments were ultimately made. Although including the legislative brownfield amendments in the budget bill (Bill 187) ensured quick passage, it effectively truncated the *EBR* public consultation process. The initial proposal notice was conceptual, and commenters expressed a clear desire to be consulted further on proposed changes as they were refined through legislative drafting. The ECO commends the government for voluntarily posting an information notice on the Environmental Registry; however, it would have been preferable for the draft legislation to have been posted at an early stage for further public comment. At a minimum, additional consultation should have been conducted regarding the more controversial components of the proposed reform such as off-site migration re-openers, horizontal severance and the RSC pre-filing process. While the legislative timetable may not have permitted a full 30-day comment period, the MOE could have posted the changes to the draft legislation for a shorter comment period consistent with the ECO's guidance in our 2000-2001 Annual Report (page 28).

Review of Posted Decision:

4.2 The *Safeguarding and Sustaining Ontario's Water Act, 2007*

Decision Information:
Registry Number: AA05E0001
Proposal Posted: January 9, 2007
Decision Posted: August 14, 2007
Comment Period: 30 days
Number of Comments: 27

Registry Number: 010-0163
Proposal Posted: April 3, 2007
Decision Posted: August 14, 2007
Comment Period: 30 days
Number of Comments: 155
Received Royal Assent on June 4, 2007
(some provisions will come into force on a date to be proclaimed)

Description

On June 4, 2007, the Ontario government enacted Bill 198 – the *Safeguarding and Sustaining Ontario's Water Act, 2007* (*SSOWA*). This Act amends the *Ontario Water Resources Act* (*OWRA*) to implement Ontario's commitments under the Great Lakes–St. Lawrence River Basin Sustainable Water Resources Agreement, 2005. *SSOWA* also amends some of the general water taking provisions in the *OWRA*.

Background:
The Great Lakes contain close to 20 per cent of the world's fresh surface water. However, the vast majority of this water is not renewable. Approximately 99 per cent of the Great Lakes surface water is considered to be a legacy of the last ice age; only about one per cent of these waters are renewed each year by precipitation, surface water runoff, and inflow from groundwater sources.

Although the Great Lakes seem inexhaustible, if water is extracted from the basin at a rate faster than it is renewed, they can and will shrink. Indeed, water levels of several of the Great Lakes, and the ecological systems associated with them, already appear to be under severe pressure. Moreover, climate change and increasing demands for water supplies are expected to compound these pressures, potentially resulting in a range of impacts including degraded ecosystems, drained wetlands, destruction of fish, bird and wildlife habitat, blocked shipping lanes and impaired drinking water sources.

Accordingly, on December 13, 2005, the governments of Ontario, Quebec and the eight Great Lakes states (Illinois, Indiana, Michigan, Minnesota, New York, Ohio, Pennsylvania and Wisconsin) signed the Great Lakes-St. Lawrence River Basin Sustainable Water Resources Agreement, 2005 (the "Agreement") to strengthen the protection of the Great Lakes-St. Lawrence River Basin (the "Great Lakes Basin").

This Agreement, which follows on commitments made in past agreements by the Great Lakes jurisdictions, provides the framework for all parties to the Agreement to implement measures to manage, protect and conserve the waters of the Great Lakes Basin. Essentially, the Agreement provides prohibitions on new or increased bulk transfers of water both out of and within the Great Lakes Basin, as well as provides exception criteria for those prohibitions. For a detailed review of the Agreement, see pages 13-19 of the ECO's 2005-2006 Annual Report.

SSOWA:

The *SSOWA* amendments to the *OWRA* implement a number of terms of the Agreement. Some of the provisions (as indicated below) came into force on June 4, 2007; the remaining amendments, which require supporting regulations or policies before they may be fully implemented, will come into force on a date to be proclaimed by the Lieutenant Governor.

Out-of-Basin Transfers (in force):

SSOWA added provisions into the *OWRA* prohibiting water takings that would transfer water out of Ontario's three basins (the Great Lakes Basin and the two other basins not included in the Agreement – the Nelson Basin and the Hudson Bay Basin) except where:

- the water is in a container of 20 litres or less;
- the water is incorporated into a product, which is then transferred out of the basin;
- the water is necessary for the operation of a vehicle, vessel or other form of transport, or for the passengers or livestock on board;
- the water is used for fire-fighting or other emergency purposes;
- the transfer commenced before January 1, 1998 and the annual volume of water transferred does not exceed the highest amount of water transferred annually prior to 1998; or
- the water is transferred pursuant to the 1913 Order of the Lieutenant Governor in Council respecting the Greater Winnipeg Water District.

This prohibition on bulk water out-of-basin transfers has existed in Ontario since 1999 in the Water Taking and Transfer Regulation (O. Reg. 387/04). *SSOWA* merely elevated the pre-existing prohibition from regulation to legislation.

Intra-Basin Transfers (not yet in force):

SSOWA introduced new restrictions into the *OWRA* on intra-basin transfers (or diversions) of water from one watershed to another within the Great Lakes Basin. The *OWRA* divides the Great Lakes Basin into five watersheds: Lake Superior, Lake Huron, Lake Erie, Lake Ontario and the St. Lawrence River.

The *SSOWA* amendments to the *OWRA*, which are adopted directly from the Agreement, prohibit new or increased intra-basin transfers where the total amount of the new transfer or the additional amount of water for an existing transfer would be more than 379,000 litres per day. The *OWRA* then provides a number of exceptions to this prohibition, also adopted from the Agreement. In addition to the exceptions set out above for out-of-basin transfers, water transfers above 379,000 litres per day may still be permitted if all of the following conditions are met:

- the amount of the new or increased water being transferred that is lost through consumptive use (i.e., that is not returned to the basin as a result of evaporation, incorporation in a product or any other process) is less than 19 million litres per day;

- the water withdrawn, less the water lost through consumptive use, will be returned to the source watershed, or the applicant establishes that it is not feasible, environmentally sound or cost-effective to return the water to the source watershed;
- the new or increased transfer cannot be avoided through efficient use and conservation of existing water supplies;
- the proposed water taking and transfer incorporates water conservation and efficiency measures;
- the amount of the transfer is reasonable given the purpose of the transfer;
- the transfer, or the precedent it sets, will not result in any significant individual or cumulative adverse impacts to water quantity or quality; and
- the transfer satisfies all other laws, as well as all other criteria included in regulations.

In addition, for water transfers for uses other than municipal drinking-water systems, or for water transfers for any purpose (including municipal drinking water) where the water will not be returned to the source watershed, the applicant must also demonstrate that, for the transfer itself (not just the return of water), there is no feasible, environmentally sound and cost effective alternative (including the conservation of existing water supplies).

The new *OWRA* provisions also provide that new or increased water transfers involving consumptive uses of over 19 million litres per day may be permitted if:

- all of the above conditions for transfers are met;
- all of the water (less the consumptive amount) will be returned to the source watershed; and
- the application for the new or increased water transfer is approved by the Minister of the Environment (not the Director), following a review by the Regional Body (which represents the ten member parties to the Agreement).

Posting the Cumulative Impact Assessment on the Registry (not yet in force):
The Agreement requires the member parties to jointly conduct a periodic assessment of the cumulative impacts of water takings and transfers from the Great Lakes Basin. *SSOWA* added a provision to the *OWRA* that requires the Ministry of the Environment (MOE) to post the assessment on the Environmental Registry for comment, specifically highlighting the parts of the assessment that consider climate change and other significant threats to the Great Lakes Basin. The ministry must also publish a statement on the Registry summarizing what actions the government intends to take in response to the assessment.

Recognition of the Precautionary Principle (in force):
SSOWA added a provision to the *OWRA* acknowledging the Agreement, and formally incorporating by reference the precautionary principle cited in the Agreement, as follows: "where there are threats of serious or irreversible damage, lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation."

Changes to Modernize the OWRA (in force):
SSOWA also updated several of the general water taking provisions of the *OWRA*, including the following changes that came into force on June 4, 2007:

- *SSOWA* introduced a purpose section to the *OWRA* which states: "The purpose of this Act is to provide for the conservation, protection and management of Ontario's waters and for their efficient and sustainable use, in order to promote Ontario's long-term environmental, social and economic well-being."

- *SSOWA* established a cap on the existing exemptions in the *OWRA* for water takings that are used for watering of livestock or poultry or for domestic purposes. To conform with the Agreement, these water takers will now be required to obtain a Permit to Take Water (PTTW) if the amount of the water taking is over 379,000 litres per day.

- *SSOWA* also clarified the authority of MOE Directors to order an individual water taker that is grandfathered or otherwise exempted to obtain a PTTW, where the Director believes that this measure is necessary in order to protect and manage Ontario's waters.

- To facilitate enforcement of water takers that do not have but may require a PTTW, *SSOWA* introduced a new provision authorizing Provincial Officers to issue an order requiring a person to monitor and report to the ministry the amount of water taken to verify whether the person is taking more than 50,000 litres per day.

Additional Changes to Modernize the OWRA (not yet in force):
SSOWA also introduced the following amendments to the *OWRA*, which are not yet in force:

- *SSOWA* amended the *OWRA* to clarify the broad authority of MOE Directors to impose a wide range of conditions in PTTWs. Prior to the amendments, the *OWRA* provided simply that a Director "may impose such terms and conditions in issuing a permit as he or she considers proper." The new provisions in the *OWRA* now explicitly illustrate the breadth of conditions that MOE Directors may include in a PTTW to regulate all aspects of water takings, water transfers, and returns of water, including conditions:
  - governing the amount, rate and manner in which water is taken;
  - limiting the amount of water to be transferred out of a Great Lakes watershed;
  - governing the quantity, quality and location of water to be returned;
  - governing the monitoring and reporting of a taking, transfer and/or their effects on water quality and quantity; and
  - requiring the development and implementation of water conservation measures.

- *SSOWA* also introduced an important new provision that authorizes MOE Directors to include conditions in the PTTW that are directed to other persons involved in the transfer of water, beyond the person taking the water (such as persons who distribute or receive the water).

- *SSOWA* introduced a new provision in the *OWRA* that allows a PTTW to continue in force indefinitely if an applicant has applied for a renewal on time, but has not received a decision from the ministry. Such extensions already occur informally; Directors now have legal authority to exercise extensions related to PTTW renewals.

- The *SSOWA* amendments to the *OWRA* provide the Lieutenant Governor in Council with a number of new regulation-making powers related to the implementation of the new *OWRA* provisions. These include powers to make regulations:
  - requiring certain classes of grandfathered water takers to obtain a PTTW;
  - prescribing a lower limit (than 19 million litres/day) for consumptive use for intra-basin transfers;
  - prescribing requirements for return flow of water;
  - governing the manner in which quantities of water are to be measured;
  - setting out how the baseline amount of transfers will be determined;
  - restricting the transfer of sewage between Great Lakes watersheds; and
  - establishing a water taking charge for commercial and industrial water takers.

Implications of the Decision

The Prohibition on Out-of-Basin Transfers Continues:
Ontario's prohibition on out-of-basin bulk water removals, which was already more stringent than the minimum prohibition set out in the Agreement, remains the same, except that it is now housed in the *OWRA* rather than regulation. Placing the prohibition in legislation makes it more difficult to amend, and thus less vulnerable to change when new governments are elected or policies shift. The out-of-basin prohibition continues to apply broadly to all bulk water transfers from all water sources in the province, and not just from the Great Lakes Basin. The various exceptions to the prohibition – for water-bottling, beverage manufacturing and other uses that incorporate water into products – continue as well.

SSOWA Introduces Minimal Restrictions on Intra-Basin Transfers:
SSOWA establishes some limited restrictions on new or increased intra-basin transfers of water. These restrictions are relatively weak, particularly as compared to the restrictions on out-of-basin transfers. Whereas most out-of-basin bulk water transfers over 50,000 litres per day are totally prohibited, the minimum threshold to simply trigger the restrictions on intra-basin transfers is 379,000 litres per day (i.e., over 7 times higher). Moreover, the actual permitted volume of an intra-basin transfer can be significantly higher – many millions of litres higher. The *OWRA* only requires that the "consumptive" portion of the transfer be less than 19 million litres before the requirement for regional review is triggered. Assuming, for example, a consumptive use rate of 10 per cent, a water taker could be permitted to transfer 191 million litres of water per day from one watershed to another. Furthermore, for existing transfers, the threshold amount only refers to the *additional* amount of the transfer, not the total permitted amount of the transfer, so transfers could be even larger still.

Yet, intra-basin transfers can pose an equal threat to the water levels of individual watersheds as out-of-basin transfers. Transferring such enormous volumes of water between watersheds could have significant impacts on the quality and quantity of the source waters and on their dependant ecosystems. In addition, the new *OWRA* provisions provide that water in an intra-basin transfer need not be returned to the source watershed if it is not "feasible, environmentally sound or cost effective". This provision has the potential to allow extremely large quantities of water (or wastewater) to be permanently removed from a watershed (possibly through so called "big pipe" projects, which divert water for municipal use).

The intent of the Agreement is to protect the integrity and viability of the Great Lake watersheds and the ecosystems that they support. However, it appears that the ministry may continue to permit large quantities of water to be diverted from individual watersheds, even though the ministry does not yet have sufficient scientific information about the Great Lakes watersheds to make informed choices, in keeping with the precautionary principle, to ensure that it is protecting the individual watersheds.

The full implications of the new intra-basin transfer restrictions will largely depend on the supporting regulations still to be developed. The government explained that it wished to build on the momentum of the Agreement and to pass *SSOWA* as quickly as possible to provide leadership to other Great Lakes jurisdictions. It further explained that to establish greater restrictions on intra-basin transfers through *SSOWA* would be considered a new policy direction that would require significant more time for policy development and public consultation. Accordingly, the government chose instead to provide a flexible legislative framework including regulation-making authorities that will allow the government the option to apply, through regulation, greater restrictions for intra-basin transfers.

Therefore, by regulation, the province may now (if it chooses) lower the threshold amount of water that may be "consumed" in a transfer (from the default amount in the *OWRA* of 19 million litres per day), include more restrictive return flow provisions, and define key terms to control intra-basin transfers, such as "feasible, cost effective, environmental sound alternative" and "cumulative impacts".

PTTW Program has become more Comprehensive:
Previously, the ministry's PTTW program only regulated the taking of water; now the *OWRA* amendments explicitly authorize MOE Directors to regulate all aspects of water takings, including the transfer and return of the water as well (even where these steps are undertaken by a party other than the water taker), through the PTTW conditions. Therefore, although the new transfer prohibitions and restrictions do not apply to existing transfers, upon any PTTW renewal, the MOE Director may, at his or her discretion, include conditions that regulate the transfer and return of the water.

The *OWRA* amendments also limit some of the PTTW exemptions for certain operations and activities. Regulating all aspects of the water taking process more comprehensively should help improve the ministry's management of Ontario's waters.

New Provisions will Improve Information on Water Transfers:
The ministry has acknowledged that it currently does not have much information on the existing water transfers taking place in the province. Therefore, to establish the baseline transfer amounts, PTTW holders may apply to the MOE Director to make a determination of the amount of water that is currently being transferred. It is in the interest of PTTW holders to seek this determination, as the new prohibitions on transfers will only apply to increases above the declared baseline amount. This provision should help the ministry gather important information about the existing transfers taking place in Ontario.

PTTWs may Continue Indefinitely:
In the Registry proposal notice, MOE proposed that an expired PTTW may continue in force for a period of up to one year if an MOE Director does not make a decision on the renewal application, after which time the PTTW would expire. In response to public comments, however, the final *OWRA* amendments state that, where an application for renewal is filed on time, the PTTW may continue in force indefinitely until a decision is made. Given the ministry's staff capacity problems and the consequent delays that frequently arise in ministry decision-making, this new provision of indefinite extensions could be problematic. This provision means that, despite the fact that MOE may issue PTTWs for short periods (e.g., two years), permit holders could potentially be granted *de facto* extensions of several years while the ministry considers the application, without the public having the benefit of a transparent renewal decision. (See the Nestle application in section 5.2.6 of this Supplement for an example of such a case).

Public Participation & *EBR* Process

In January 2007, Ontario posted a proposal notice on the Registry (number AA07E0001) to advise the public that the ministry was amending the *OWRA* to implement the Agreement and modernize the *OWRA*, and to seek public comment on the proposed amendments. This consultation built on the extensive public consultation that the government undertook in 2004 and 2005 when it was negotiating the Agreement. The ministry provided a 30-day comment period, and received 27 comments in response to this proposal.

On April 3, 2007, the ministry introduced Bill 198 (*SSOWA*) for first reading, and posted a second proposal notice on the Registry (number 010-0163) for a further 30-day consultation period. This second proposal notice included a copy of the draft Bill 198. The ministry received 155 comments in response to the draft bill. Throughout the development of *SSOWA*, the ministry also continued consultation with the Annex Advisory Panel – a stakeholder panel comprised of environmental organizations, industry groups, municipalities and academics. A decision notice for both proposals was posted on August 14, 2007, two months after *SSOWA* received royal assent.

Summary of Comments:
For the most part, the commenters expressed widespread support for the proposed Bill 198. Most commenters commended the government for its leadership in negotiating the Agreement and for being quick to develop *SSOWA*. However, all commenters had concerns regarding some aspects of the bill.

Consultation Process:
While a few commenters remarked that the 30-day comment periods were insufficient, many more commenters commended the government on the excellent consultation that had taken place throughout the development of the Agreement. In addition, many groups acknowledged the importance of having this legislation pass as quickly as possible to capitalize on the momentum and consensus built during the signing of the Agreement and to set a precedent for the other Great Lakes jurisdictions.

Exemption for Bottled Water from the Transfer Prohibitions:
A significant number of the comments received were form letters/emails from individuals expressing strong opposition to the exemption granted for bottled water (in containers under 20 litres) from the prohibitions on water transfers. These commenters argued that a truck loaded with water bottles and a tanker carrying the equivalent amount of water in a single container have the same impact on a watershed.

Strengthening of Restrictions on Intra-Basin Transfers:
The main issue raised by numerous environmental groups was the need for stronger restrictions on intra-basin transfers. While most of these groups applauded the government for its strict prohibitions on out-of-basin transfers, these groups stated that the legislation inadequately restricts intra-basin transfers.

Specifically, several groups commented that the threshold to trigger any restrictions on intra-basin water transfers (i.e., 379,000 litres a day) is much too high. Some groups recommended that the threshold be reduced to 50,000 litres per day to minimize intra-basin transfers and maintain consistency with the broader permitting program. One group suggested that if the threshold is to remain at 379,000 litres per day, this limit should apply to the total transfer, not just the additional amount of the transfer. Other groups recommended that the upper limit on transfers (which is 19 million litres of water consumed per day before regional review is required) should be based on the total amount of the transfer, and not the amount "consumed".

The main concern expressed by most environmental groups with respect to the intra-basin transfer provisions, however, was the failure of the *OWRA* amendments to require all intra-basin water transfers to be returned to the source watershed. These commenters noted that the *OWRA* provision that allows water to not be returned to the source watershed, if it is not "feasible, environmentally sound or cost effective" to do so, has the potential to allow vast quantities of water to be removed from a watershed. These groups argued that intra-basin transfers – like out-of-basin transfers – can contribute to declining water levels of individual watersheds and add stress to ecological systems that are already under severe pressure. A few groups argued that allowing intra-basin transfers without first developing a better understanding of the cumulative impacts of such transfers contradicts the precautionary principle. Another commenter noted that if large scale intra-basin transfers continue to be a viable option, the incentive to implement water conservation measures, which is critical to sustainable water management, will be radically diminished.

As illustration of their concerns, several commenters pointed to the York Region proposal (ongoing at the time of the *SSOWA* proposal) to build a big pipe to discharge wastewater, produced from water originally withdrawn from the Lake Huron watershed, into the Lake Ontario watershed. Many groups expressed serious concerns about the potential ecological impacts of such a proposal, as well as the precedent it may set for other municipalities considering new "big pipes" to carry water or wastewater from one watershed to another. These groups stated that such proposals may have serious environmental consequences not only for the watershed that is losing the water, but also for the receiving watershed where the wastewater is being dumped.

For these reasons, many environmental groups recommended that Bill 198 be amended to establish an absolute requirement for return flow to the source watershed for all intra-basin transfers. Alternatively, if amendments are to be enacted as proposed, many groups stated that future supporting regulations should provide significantly more stringent return flow provisions. These commenters also argued that the regulations should generally provide stricter requirements for assessing intra-basin transfers, including rigorous requirements for assessment of the cumulative impacts of such transfers.

Numerous commenters also asked the government to impose an interim moratorium on approvals of all new or increased intra-basin transfers until such time that stringent regulations are established to effectively assess the sustainability of proposed transfers. These commenters noted that, in keeping with the precautionary principle, large intra-basin diversions should not be permitted until the government has sufficient scientific knowledge to properly assess and monitor the ecological impacts.

Limiting the Restrictions on Intra-Basin Transfers:
Conversely, a few municipalities commented that the *OWRA* should explicitly exclude large regional water supply systems from the provisions on intra-basin transfers. These municipalities noted that the restrictions may adversely affect municipal options for large regional water supply systems that cross boundaries, and may pose a challenge for municipalities trying to meet long-term water supply needs, especially where growth is mandated under the *Places to Grow Act*.

One industrial group commented that the legislation should only focus on ensuring that water is not diverted out of the Great Lakes Basin, arguing that restrictions on intra-basin transfers are not needed as all water drawn from the basin is eventually returned to the Great Lakes one way or another.

The Need for Strong Conservation Measures:
Several environmental groups commented on the need for the government to make strong conservation programs a top priority. They noted that strong legal and institutional backing is needed to promote water conservation and efficiency measures to reduce demand for water takings and transfers, rather than permitting big pipes to meet new demands. Two of the groups also noted that these measures are important as a matter of perception. If Ontario does not implement strong requirements for conservation programs, Ontario may be perceived as endorsing a protectionist Agreement that discourages outsiders from access to Great Lakes waters, while those within the Great Lakes Basin are permitted to continue to waste it with reckless abandon.

Modernizing of the OWRA:
Many commenters commended the ministry for including the precautionary principle in the *OWRA*. Several environmental groups also expressed support for the cap on the exemptions for livestock watering and domestic purposes and the new regulation-making authority to remove other exemptions for grandfathered water takers. Many of these commenters suggested, however, that *SSOWA* go further and remove all exemptions (i.e., require a permit for every water taking over 50,000 litres per day) to ensure consistency and fairness and better protect Ontario's waters.

Several industrial associations, on the other hand, commented that it was inappropriate and misleading for MOE to include amendments to the *OWRA* that have broad, province-wide application in the proposal notices regarding the implementation of the Agreement. These commenters stated that the "modernizing" provisions (such as the cap on certain exemptions and the provisions relating to grandfathering, which apply to water takings across the province) should only apply to the Great Lakes Basin area covered by the Agreement, or they should be subject to a separate debate and Registry posting. Many of these industrial groups opposed the new regulation-making authority to require grandfathered water takers to obtain permits, arguing that it will unnecessarily raise costs for them.

One-Year Extension for PTTW Renewals:
Several commenters expressed concern that the one-year extension for a PTTW renewal (as originally proposed) was not sufficient given that the lack of capacity at MOE may result in processing delays that extend beyond that timeframe. These commenters recommended that PTTWs remain valid until the ministry renders a decision.

Water Taking Charges:
A large number of commenters expressed opposition to the proposed water taking charges. These comments are discussed in the related decision review on the water taking charge regulation in section 4.9 of this Supplement.

Changes made in Response to Comments:
In response to the comments received through the Registry postings and other stakeholder consultations, several changes were incorporated into the final legislation.

In response to the numerous comments seeking stronger controls on intra-basin transfers, the government included new authorities in the *OWRA* to establish regulations to, among other things: lower the maximum amount of transferred water that may be consumed; require "return flow" for smaller transfers to the source watershed; and introduce additional criteria to control intra-basin transfers. MOE also noted in the decision notice that it would continue to engage in a dialogue with stakeholders to discuss the possibility of interim measures to address new or increased intra-basin transfers while supporting regulations are being developed.

In response to comments seeking stronger conservation provisions, the government added a provision to *SSOWA* explicitly stating that the Director has the authority to require water conservation plans as a condition in a PTTW, as well as adding the regulation-making authority to require the preparation and implementation of water conservation plans.

In response to comments regarding the one-year limit on PTTWs where a renewal decision has not been made (as proposed in the draft Bill 198), the bill was amended to allow a PTTW to continue in force indefinitely if an applicant has applied for a renewal on time, but has not received a Director's decision.

SEV

MOE provided a brief statement indicating that the *OWRA* amendments contribute to MOE's commitment to protect the environment in the following ways: they enhance protection of the Great Lakes Basin waters; they encourage resource conservation by enhancing sustainable use and management of the basin waters; and they promote an ecosystem approach by clarifying rules about considering the natural functions of the ecosystem when evaluating PTTWs.

Other Information

Regulations pursuant to the SSOWA Amendments:
On August 10, 2007, the provincial cabinet filed two new regulations pursuant to the new regulation-making authorities provided by *SSOWA*:

- O. Reg. 450/07, which establishes water taking charges for certain commercial and industrial water takers (see the decision review in section 4.9 of this Supplement); and
- O. Reg. 451/07, which made some consequential amendments to the Water Taking and Transfer Regulation (O. Reg. 387/04), as follows:
  - It revoked the provisions regarding out-of-basin water transfers, as these are now in the *OWRA*;
  - It changed the name of the regulation from the "Water Taking and Transfer Regulation" to the "Water Taking Regulation" because the transfer-related provisions were moved to the *OWRA*;
  - It revoked the purpose clause in O. Reg. 387/04, because a similar provision was added to the *OWRA*; and
  - It required grandfathered water takings (i.e., takings that commenced prior to March 30, 1961) that fall under one of the categories of facilities listed in the new water taking charge regulation to obtain a PTTW.

The government also rescinded the *Water Transfer Control Act*. This Act, which had never been proclaimed into law, governed inter-basin transfers, and thus, was no longer required.

Proposal for Regional Water Conservation and Efficiency Objectives:
On September 4, 2007, MOE posted a proposal notice on the Registry for the Great Lakes "Regional Water Conservation and Efficiency Objectives". The Agreement requires the Great Lakes jurisdictions to cooperatively develop regional water conservation and efficiency objectives. Once adopted, these regional objectives are intended to guide the development of each jurisdiction's individual water conservation and efficiency goals, objectives, and programs. In April 2008, MOE posted a decision notice on the Registry stating that the regional objectives had been adopted.

Implementation of the Agreement in Other Jurisdictions:
While *SSOWA* implements the Agreement in Ontario, the Great Lakes Compact must be ratified by each of the eight Great Lakes states, as well as the U.S. Congress in order for the Agreement to be incorporated into state law. By July 2008, all eight states had ratified the inter-state compact, and in early August 2008, the U.S. Senate had also approved the compact. As of August 2008, the compact still required approval from the U.S. Congress.

ECO Comment

Prior to the passage of *SSOWA*, Ontario already had one of the most comprehensive and rigorous water permitting systems in North America, as well as some of the strictest prohibitions on out-of-basin water transfers in the Great Lakes Basin. With *SSOWA*, Ontario has again demonstrated strong leadership with respect to water management in the Great Lakes Basin by being an early implementer of its commitments under the Agreement.

While Ontario has certainly gone beyond the Agreement with its prohibition on out-of-basin diversions, and should be commended for this, the ECO notes that the province still permits substantial water takings (for consumptive uses such as water bottling, beverage manufacturing, fruit and vegetable canning, etc.) that permanently remove water from the Great Lakes Basin. The ECO encourages MOE to assess the cumulative impacts and the long-term viability of such excluded water takings, and to continue to review and revise its permitting system to reflect the findings of such assessments.

Similarly, while the restrictions on intra-basin transfers clearly meet the minimum requirements set out in the Agreement and are an important first step, the *OWRA* now provides an enormous disparity between the permitted volumes for out-of-basin transfers and intra-basin transfers.

Yet, intra-basin transfers may be equally harmful to the ecosystems as out-of-basin transfers. Large-scale intra-basin transfers can lower the water levels of individual watersheds, adding stress to dependant ecosystems and economies; they can shift nutrient and pollutant loadings from one watershed to another; and they can undermine local water conservation initiatives. In addition, permitting large-scale intra-basin transfers runs contrary to efforts to establish communities that live sustainably within their ecosystem limits (see the discussion on pages 22-24 of the ECO's 2006-2007 Annual Report).

Accordingly, the ECO believes that, to achieve the goals of the Agreement to conserve and protect the waters of the Great Lakes watersheds and the ecosystems they support, more stringent restrictions on intra-basin transfers should be implemented. The Agreement provides clear authority for any jurisdiction to go beyond the minimum requirements in the Agreement. And, Ontario, which contains four of the five Great Lakes within its boundaries, is the jurisdiction with the greatest ability (and arguably responsibility) to control intra-basin diversions.

The ECO appreciates the government's decision to pass *SSOWA* quickly (to capitalize on the momentum of the Agreement and set a positive example for other jurisdictions), and thus, the decision to adopt the minimum restrictions for intra-basin transfers from the Agreement into the *OWRA*. However, as the government engages in the next round of consultations on the development of the supporting regulations, the ECO urges the province to develop stringent regulations that will provide greater restrictions on intra-basin transfers. The effectiveness (or lack thereof) of the new *OWRA* provisions in protecting the Great Lakes water resources will largely depend on these regulations.

The ECO also encourages the provincial government to continue its leadership role in the Great Lakes by implementing strong water conservation programs that will set a positive precedent for the other jurisdictions. *SSOWA* created the framework for establishing conservation measures; now the ECO hopes that the province will move forward quickly in implementing conservation and efficiency measures, such as requiring water conservation plans for all water takers. Water conservation and efficiency programs are a key part of the strategy for reducing the need for water withdrawals and transfers.

The ECO also notes that the new transfer prohibitions and restrictions do not apply to existing transfers. The ECO believes that Ontario (along with the other Great Lakes jurisdictions) should prioritize gathering better information about the current status of the Great Lakes to determine if existing transfers are ecologically sustainable, before it permits new or increased transfers. The ECO also urges MOE to assess renewal applications for existing water takings and transfers with the same level of rigour as new applications.

Finally, the ECO supports the *SSOWA* amendments to modernize the *OWRA*. The ECO is pleased with the new provision that enshrines the precautionary principle in the *OWRA*, as well as with the additional powers granted to MOE Directors, which will hopefully improve the overall effectiveness of the water taking permit program.

Review of Posted Decision:

4.3 Developing an Odour Policy Framework

Decision Information:

Registry Number: PA05E0007
Proposal Posted: April 5, 2005
Decision Posted: August 31, 2007
Comment Period: 60 days
Number of Comments: 9
Decision Implemented: Ongoing

Registry Number: RA06E0006
Proposal Posted: June 15, 2006
Decision Posted: August 31, 2007
Comment Period: 102 days
Number of Comments: 24
Came into Force: Ongoing

Description

In 2005, the Ministry of the Environment (MOE) announced that it would be developing an Odour Policy Framework. The Framework would help industry obtain air approvals and select appropriate odour abatement options. It would also help MOE deal with odour complaints. While MOE is continuing to develop the framework, some aspects have now been decided. In particular, MOE has selected the method of establishing odour-based air quality standards for compounds and the time period over which an odour must be perceived in order for the odour-based standards to apply. MOE has also decided to apply the new odour-based standards to locations "where human activities regularly occur at a time when those activities regularly occur," which is a new type of point of impingement (POI). In August 2007, the Ontario government amended O. Reg. 419/05: Air Pollution – Local Air Quality under the *Environmental Protection Act* (*EPA*) to include new odour-based standards for three compounds at the new type of POI. Facilities that exceed these standards based on a 10-minute exposure period (averaging period) will be guilty of an offence. The amendments do not apply to agricultural operations.

Regulation of Air Quality:
From the 1970s until recently, the *EPA*, R.R.O., 1990 Regulation 346: General – Air Pollution (Reg. 346) and related policies have been used to manage air quality in Ontario to protect human health and the environment. Air quality standards, guidelines and ambient air quality criteria (AAQCs) for numerous contaminants were developed based on health and environmental considerations, although these were sometimes relaxed due to socio-economic and technical considerations. Air dispersion models that predicted how air emissions from facilities disperse were used to predict concentrations of air-borne contaminants beyond a facility's property line and at sensitive POIs, including residences, schools and hospitals. However in the 1970s, few peer-reviewed studies were available on which reliable odour-based limits could be based and air dispersion models were rudimentary compared to today's models.

Definitions:

Air quality standard – an enforceable maximum permitted concentration of a specific contaminant associated with a specific facility.
Air quality guideline – an unenforceable maximum permitted concentration of a specific contaminant associated with a specific facility. Although MOE cannot use a guideline as an enforcement tool, it can be given legal effect by reference in a C of A (Air).
Ambient air quality criterion (AAQC) – an unenforceable maximum permitted concentration of a specific contaminant in ambient air. An AAQC is usually set at a level not expected to cause an adverse effect based on continuous exposure. AAQCs are a type of guideline and can be given legal effect by reference in a C of A (Air).
Compliance – refers to adherence to a specified set of requirements. In the case of air quality, legal requirements are outlined in the *EPA*, O. Reg. 419/05 (and potentially other regulations), and air approvals, i.e., Cs of A (Air). MOE ensures compliance using various methods, including education, voluntary and mandatory abatement measures, and fines.
Point of impingement (POI) – is the location at which air quality is determined by air quality dispersion models and/or actual measurement. For example, facilities with air emissions are required to use the air dispersion models prescribed in O. Reg. 419/05 in 2005 to predict air quality at their property boundaries, and nearby day care centres, senior citizens' facilities, hospitals and schools.

In 2005, substantial changes were made to the regulation of air quality in Ontario. Ontario Reg. 419/05 replaced Reg. 346 and will be fully phased-in by 2020. Although odour impacts were considered, the new effects-based air quality standards, guidelines and AAQCs were approved based on their health and environmental impacts only. MOE used toxicological and environmental information, including health, vegetation, soiling, visibility and corrosion for half-hour, one hour and 24 hours averaging times to establish new or confirm existing air quality limits. The new effects-based standards introduced in 2005 under O. Reg. 419/05 are as much as one hundred times more stringent than those in Reg. 346. In addition, more accurate and sophisticated air dispersion models were prescribed. Although O. Reg. 419/05 includes a few odour-based standards, they were not updated to reflect MOE's new approach to setting air quality standards due to issues raised by stakeholders; instead, MOE decided to develop an Odour Policy Framework. The first position paper on the subject was released in April 2005 and a second position paper was released in June 2006 for public consultation. Both position papers are described in greater detail below and are the subjects of this review. For the ECO's review of O. Reg. 419/05, refer to our 2005-2006 Annual Report, pages 89-96.

Facilities with air emissions are required to apply to MOE for certificates of approval (Cs of A) for Air under section 9 of the *EPA*. Whether or not a facility is in compliance with O. Reg. 419/05 or its C of A (Air), a facility is prohibited under section 14(1) of the *EPA* from emitting a contaminant, including an odorous contaminant that causes an adverse effect. An adverse effect can include, for example, harm or material discomfort to any person, an adverse effect on the health of any person, loss of enjoyment of normal use of property, or interference with the normal conduct of business.

The objective of MOE's Guideline D-6 "Compatibility between Industrial Facilities and Sensitive Land Uses" is to "prevent or minimize the encroachment of sensitive land use upon industrial land use and vice versa." Last updated in 1994, the Guideline defines sensitive land uses and classifies industrial facilities according to their potential to cause adverse air quality. Based on this classification, the Guideline recommends separation distances between incompatible land uses. However, the Guideline cautions that zoning by-laws are difficult to correlate with industrial classifications and that site-specific zoning may be required.

Managing Odour is Challenging:
Although odour complaints are common, they have not received the same attention by regulators as other air quality concerns. The Greater Vancouver Regional District has estimated that 75 per cent of their air quality complaints are related to odour. Part of the challenge is that some factors that influence how odour is perceived can be measured, while others are subjective and cannot be measured quantitatively. As a result, it is challenging to set enforceable and defensible odour-based standards that protect people from truly offensive odours and are fair to industry; instead, odour is managed as a nuisance and response is generally complaint-driven.

In the late 1990s, MOE updated its Operational Delivery Strategies and Compliance Guideline, and developed its Procedures for Responding to Pollution Incident Reports (PRPIR). Together these documents assisted MOE staff with determining how program priorities and plans including the air program should be set, compliance priorities and how potential non-compliance with environmental legislation should be approached. The PRPIR outlined four levels of response depending on the extent of an incident's environmental significance – a priority field response, a field response, no field response, and no response. For example, MOE may respond to repeated odour complaints directed at an industrial facility; whereas, MOE would refer complainants concerned about odours from a residence, e.g., roof tarring, to their local municipalities. In general, MOE staff were not expected to deal with odour complaints. Although the government and MOE continued to strengthen their approach to ensuring compliance with environmental legislation by introducing administrative monetary penalties, increasing environmental fines and using more mandatory abatement measures, these initiatives were aimed primarily at incidents that could have significant health and/or environmental consequences rather than at odour nuisance calls. For additional information regarding MOE's approach to compliance and enforcement in the late 1990s and 2000, refer to the ECO's 2000-2001 Annual Report, pages 72-84.

In 2005, MOE released its "Field Guide for Environmental Officers: Applying Compliance and Enforcement Tools" that provides Environmental Officers with a framework for deciding on the appropriate enforcement action. Human health and environmental consequences and the compliance history of the facility are the primary considerations. According to the framework, Environmental Officers should take mandatory abatement and possibly enforcement action for incidents affecting human health.

People's perception of odour is influenced by their mental and physical health. One person's perception of odour can be quite different from another person's and can vary over time. People can become less sensitive after repeated exposures to an odour, while others, more sensitive. Furthermore, some people may enjoy a particular odour, e.g., roasting coffee, while others may find the same odour annoying or sickening. People may also complain of a wide variety of health effects in response to an odour, such as loss of appetite and nausea, headaches, impaired breathing, stress, loss of sleep, and allergic reactions. Since it is very difficult to assess health effects on a case-by-case basis and to attribute them directly to a specific odour event, MOE relies on doctor's notes. The courts have ruled that medical evidence provides strong support for claims of human health effects when an adverse effect is subjective in nature.

The environment can also affect how odour is perceived. Elevated ambient temperature and humidity, and the presence of other odours, e.g., exhaust fumes or smoke, can intensify an odour. Conversely, an odour that is detectable in a clean environment may not be detectable on a city street. In addition, one odour may mask another odour, a technique that is sometimes used by industry and consumers to divert attention away from unpleasant odours. Time of day and season can also influence whether or not anyone complains about an odour. Odours emitted on a winter's night next to a park are unlikely to result in complaints.

Proposed Revisions to Odour-based Ambient Air Quality Criteria and Development of an Odour Policy Framework – PA05E0007:
MOE released the first position paper, "Proposed Revisions to Odour-based Ambient Air Quality Criteria and Development of an Odour Policy Framework," for public comment in 2005. In it, MOE outlined the components of a proposed Odour Policy Framework as follows:

1. Applicability and Implementation – guidance will be developed for facilities with known or anticipated odour-related issues. Facilities without odour-related issues will be excluded from the framework.
2. Receptor – develop the concept of a receptor (POI) that links sensitivity to odours and adverse effects. Receptors beyond a facility's property line will be defined.
3. Objective limits for odour – establish limits for the intensity or offensiveness of an odour based on olfactometric analysis.
4. Methods – document methods for odour dispersion modelling, assessing odour impacts, and sampling and laboratory analysis.
5. Considerations for meeting objective limits for odour – develop methods to verify compliance with the objective limits for odour.
6. Reporting compliance with objective limits – explain how facilities can demonstrate compliance.

MOE explained that the impact of an odour event, including the number of complaints arising from the event, can be influenced by five factors – frequency (F), intensity (I), duration (D), offensiveness (O) and location (L) of the event (FIDOL). All of the FIDOL factors except offensiveness can be measured. Offensive or unpleasant odours are described using subjective terms, such as fishy or rancid. In addition, odours from certain types of facilities, e.g., wastewater treatment plants and crematoria, are perceived as more offensive than, for example, odours from cookie manufacturers. The ECO's review of an application for investigation into odorous air emissions from a crematorium can be found in section 6.1.2 of this Supplement. Intensity refers to a person's perception of the strength or concentration of an odour, and can be measured in a number of ways. Even pleasant odours, such as perfumes, can become offensive if they are strong. In the position paper, MOE explained that "duration" of an odour event influences how many complaints are received. People will tolerate an odour for only about 10 minutes before complaining.

MOE requested feedback on two options for setting short-term odour-based AAQCs for odorous compounds. The data for both options would be obtained from studies done by the American Industrial Hygiene Association (AIHA) in 1989 and by ORTECH in 1991. In option 1, AAQCs would be based on the concentration at which 50 per cent of the general population can detect the compound's odour, i.e., the 50 per cent odour detection threshold (ODT). In option 2, AAQCs would be based on the 50 per cent ODT calculated in option 1 weighted by the ratio of the concentration at which 10 per cent of the general population complains and 50 per cent ODT. Option 2 would result in more stringent AAQCs for more offensive odours and less stringent AAQCs for less offensive odours than option 1.

Since the majority of odour complaints are caused by mixtures, which are comprised of multiple compounds that may be interacting with each other affecting the overall odour properties, MOE also proposed two approaches for setting odour-based limits for mixtures. In one approach, samples of an odorous mixture would be repeatedly diluted with equal volumes of odour-free air until 50 per cent of a panel of trained people could no longer detect the odour. The number of dilutions, reported as the number of odour units (OUs), would be a measure of the intensity of the mixture's odour. Alternatively, if each chemical in the mixture can be identified, a hazard index (HI) could be calculated using the chemicals' concentrations in the mixture and OUs. MOE indicated that the HI would not be used to confirm compliance with O. Reg. 419/05, but could be used during the design of the facility and its processes, and assessment of a facility's ability to comply with O. Reg. 419/05. In addition, the paper is silent on the deliberate use of "pleasant" odours to mask "unpleasant" odours.

Proposed Approach for the Implementation of Odour-based Standards and Guidelines – RA06E0006:
In this follow-up position paper released in June 2006, MOE discussed its decision to use 10 minutes as the basis for establishing new odour-based standards and guidelines and proposed a tiered approach to implementing the 10-minute odour-based standards and guidelines.

MOE provided additional information on the five FIDOL factors identified in the first position paper. In particular, MOE explained that frequency is a measure of how often a person is exposed to an odour in the ambient environment, and that some odours can be very intense at very low concentrations. In addition, some people are 100-1000 times more sensitive than others to odours. Lastly, MOE explained that location is the description of the area affected by the odour event, and may include the zoning designation (e.g., residential), type of activity (e.g., sports), and sensitivity of the receptor to odours (e.g. children).

MOE provided examples of how FIDOL factors would be considered within the framework and in determining odour limits. For instance, highly offensive and high intensity odorous compounds, such as Total Reduced Sulphur, would be subject to odour-based standards, which are enforceable; whereas, less offensive and intense compounds, such as toluene, would be subject only to guidelines, which are not generally enforceable.

MOE explained that it had selected option 1, 50 per cent ODT, described in the first position paper as the basis for developing 10-minute odour-based standards (which would be added to Schedule 3 of O. Reg. 419/05) and guidelines for compounds. Option 1 was chosen based on stakeholder feedback on the first position paper (Registry number PA05E007) and because it provided better consistency with MOE's current odour-based standards and guidelines. Option 2 was not chosen because of the lack of data in the public domain for a wide range of contaminants.

In the position paper, MOE proposed to make it an offence to exceed a 10-minute odour-based standard at POIs frequented by humans including residences, schools and day care centres. MOE also proposed that a maximum of 13 exceedences per year of a 10-minute odour-based standard or guideline would be allowed. In other words, a facility must comply with the 10-minute odour-based limits at least 99.85 per cent of the time. MOE also proposed a tiered approach to implementing the 10-minute odour-based limits. If an initial screening indicates that a facility will not be able to comply with the 10-minute odour-based limits, additional modelling runs with regional and/or local meteorological data would be required.

MOE advised that it plans to develop guidelines for identifying POIs "frequented by humans" and methods for considering frequency of exposure.

Related Contaminant Specific Proposals:
In two related notices posted on the Registry in June 2006, MOE proposed:

- 10-minute odour-based standards for three highly odorous substances: Total Reduced Sulphur (TRS), hydrogen sulphide (H_2S), and mercaptans;
- 10-minute odour-based guidelines for two other highly odorous substances, dimethyl sulphide and dimethyl disulphide; and
- amendments to Schedule 3 of O. Reg. 419/05 to implement the proposed odour-based standards.

Additional information on these proposals is available on the Registry by searching for PA05E0030 and RA06E0005.

MOE's Decision:
On August 31, 2007, MOE posted the decision notices for the above four proposals and advised that O. Reg. 419/05 had been amended. Schedule 3 of O. Reg. 419/05 was amended to include 10-minute odour-based standards for Total Reduced Sulphur (TRS), hydrogen sulphide (H_2S) and mercaptans that were calculated using 50 per cent ODT. Facilities will be required to comply with the new standards by 2013 unless they have been phased-in earlier or have been approved to use another standard. Non-compliance with the 10-minute odour-based standards at POIs "where human activities regularly occur at a time when those activities regularly occur" will be an offence if the non-compliance is based on actual measurements. However, it will not be an offense if air dispersion modelling runs indicate that a facility is exceeding the 10-minute odour-based standards. Numerous other amendments, including several exemptions to the above requirements, were also made to O. Reg. 419/05 on the same date.

MOE acknowledged that more work is required on odour-related limits for mixtures, odour-based guidelines for compounds and modelling of limits with 10 minute averages. MOE also explained that the public will be consulted on additional aspects of the framework as they are developed.

Implications of the Decision

With these decisions, MOE took the first steps towards strengthening the regulatory and policy framework for managing odorous substances and re-affirmed its commitment to consult with stakeholders and the public on key decisions. However, since the three 10-minute odour-based standards established so far will not be fully in force until 2013, it will be a long time before Ontarians benefit from these changes. In addition, these decisions do not affect how odours from residential sources are managed.

Public Participation & *EBR* Process

The first position paper (PA05E0007) was posted on the Registry on April 5, 2005, for a 60-day comment period. The second position paper (RA06E0006) was posted on the Registry on June 15, 2006, for a 102-day comment period. Nine written comments were received on PA05E0007 and 24 comments on RA06E0006. MOE summarized the comments for both proposals in the decision notice for RA06E0006. Most comments were from industry associations, industrial companies and odour consultants. Only two members of the public commented on the proposals.

Odour Management is Required:
Although many commenters were supportive of MOE's intent to develop an odour policy framework and to use standards to manage highly offensive and intense odours and guidelines to manage less offensive and intense odours, many were very concerned that the subjective nature of odour would pose some significant challenges. The Canadian Vehicle Manufacturers Association (CVMA) noted that odour cannot be accurately modelled and predicted. Some industry associations suggested that odour-based limits should not be regulated and advised that MOE should not consider odour when it reviews applications for Cs of A (Air). Alternatively, MOE should consider odour only if there is a known problem and manage odour issues on a case-by-case basis as a nuisance. In other words, MOE should rely on section 14(1) of the *EPA* when it manages odour issues.

In contrast, both members of the public advised that regulation of odour is overdue, adding that "air free from offensive and sickening odours" is a right, not a privilege. They believe that MOE should ensure that violations of odour regulations result in fines, penalties and loss of approvals, and that MOE should publish the odour records of facilities.

Several industry associations and companies were concerned that 10-minute odour-based standards will be more onerous than health- and environment-based standards. Inco and the Ontario Forest Industries Association (OFIA) recommended that 10-minute odour-based standards be included in an Odour Policy and only health-based standards be included in Schedule 3 of the regulation. Some stakeholders suggested that odour-based limits should be used by facilities for screening purposes only, that is, for initial assessments of whether or not their predicted odour emissions would be acceptable. Others suggested that O. Reg. 419/05 should only define odour-based standards for highly offensive and intense odours.

Several commenters recommended that MOE implement an odour complaint resolution system, similar to the one being used by the Sarnia Lambton Environmental Association. Toronto Water noted that it had to file a freedom of information request with MOE to get the list of odour complaints for its own wastewater treatment plants. A member of the public advised that the local MOE office doesn't record an odour offence unless it is at a residence, school or business.

Sensitive Receptors:
Many industry associations and companies were concerned that MOE's proposal to introduce the concept of sensitive receptors (locations where human activities occur) would introduce ambiguity and uncertainty into the process. Many commenters requested clarification of the definition of "sensitive receptors" and suggested that the term should only refer to locations where people spend significant amounts of time. Inco suggested that roads that pass through a company's property, lands zoned for industrial use or for future commercial/residential use should not be included. Some commenters advised that MOE should

use the property line as the receptor and not extend it to nearby recreational areas including hiking trails and canoe routes. Furthermore, facilities that allow public access/recreational activities on their properties may not be able to continue this practice. Both members of the public disagreed, recommending that parks and roads should be included as receptors.

Odour-based AAQCs:
Many commenters challenged MOE's proposed methods for calculating ambient AAQCs. Some commenters did not support either option for developing AAQCs. Some commenters considered the complaint level of 10 per cent in option 2 for compounds to be too stringent. Weyerhaeuser Company Ltd. noted that California uses a complaint level of 30 per cent and advised that odour standards should not be based on detectability alone – health impacts should also be considered. However, the City of Toronto Medical Officer of Health supported the use of option 2 for offensive substances and option 1 for low offensive substances, and thought that there should be more consideration of the higher sensitivities of developing foetuses, infants and children up to the age of three. Conestoga-Rovers and Dofasco suggested that the threshold at which an odour can be recognized should be used instead of the detection threshold (which is lower).

The Region of Peel thought that using 50 per cent ODT for developing odour-based limits and 13, the maximum number of allowed exceedances, were not stringent enough. The Region explained that half the exposed population would still be able to detect the odour at 50 per cent ODT and potentially complain, and that allowing 13 exceedences of odour-based standards was too many.

Mixtures - Odour Unit Level too Stringent:
Many commenters advised that it is not possible to comply with an OU of one since ambient OU levels often exceed one. The United States uses OUs of two to seven. According to Pinchin Environmental, odour complaints almost never occur until odour levels exceed one OU for offensive odours and five OUs for less offensive odours. In addition, it noted that current technologies used to treat odours may no longer be allowed since they inherently will not meet one OU.

Toronto Water also thought that one OU was too stringent, advising that one OU was essentially undetectable except under laboratory conditions and does not equate with loss of enjoyment. Toronto Water noted that lake water, unmown fields and common building materials produce odours in the 10 OU range and that modelling of the grassed and parking lot areas of a facility would cause the facility to be out of compliance. Toronto Water has found that frequent OU levels of three to five are unlikely to trigger complaints.

Some commenters were concerned that using the simplistic HI formula for measuring odour levels of mixtures will yield results that cannot be relied upon because of the complex nature of mixtures.

Calculation of the Number of Exceedences:
Many commenters had concerns about how the number of exceedences of odour limits would be calculated. Some industry associations and companies suggested that only exceedences that result in complaints should be counted, and recommended that the time of day and year be considered since odours emitted in the middle of the night in the winter are less likely to cause an adverse effect than odours emitted in the middle of the day in the summer.

Odour Studies and Standards:
Several commenters supported MOE's intention to use current studies to establish new odour standards and guidelines but noted that the two studies – AIHA and ORTECH – selected by MOE were more than 15 years old. According to Pinchin Environmental, most of the data for the AIHA study were collected before 1970 and some came from the late 1800s, and the data for the ORTECH study were collected before 1991. Furthermore, the data were not collected using methods that are consistent with today's best practices and should not be considered state-of-the-art. The AIHA study reported a fourfold difference in odour threshold values depending on how the odour sample was presented to the panel. Large differences can exist between laboratories that use the same olfactometric equipment, according to Pinchin Environmental and Canadian ORTECH Environmental. Proctor & Gamble advised that the AIHA

study was being updated and Canadian ORTECH Environmental advised that the ORTECH study needed updating.

Some commenters recommended that MOE adopt international standards for odour sampling and lab analysis such as the European Standard CEN EN13725 and/or the American standard ASTM E679-04 to ensure that results are reliable and repeatable. MOE would then be able to use data from other jurisdictions and defend its data. Furthermore, adoption of internationally recognized standards would help equipment suppliers. In a telephone survey, Pinchin Environmental found that most Canadian and American laboratories were complying with CEN EN 13725 and ASTM E679-04.

Pinchin Environmental noted that MOE's odour sampling and analysis standard has been in draft form since 1982.

Land Use Planning:
Several commenters noted that odour complaints are sometimes the result of inappropriate planning decisions. Residential development and other sensitive land uses are approved without sufficient consideration of potential odour impacts from odour-producing neighbours, e.g., industry, wastewater treatment facilities and landfill sites. Furthermore, changes in land use may cause a facility to become non-compliant. Some commenters recommended that the province become more involved in land use decisions to ensure that odour is considered, that setbacks are used and enforced, and that first use of land/property is recognized.

Effect of the Comments:
In response to the comments, MOE agreed to make several changes and do further work on several aspects of the proposals. The 10-minute odour-based standards will be applicable at locations where human activities regularly occur only at times when those activities regularly occur. The original proposal did not consider when those activities occur. MOE will consult with industry before developing further guidance material on how the 10-minute odour-based guidelines will apply, clarifying the phrase "when human activities regularly occur," and proposing a significant increase in the frequency of exceedences at human receptors. MOE indicated that it will not implement 10-minute odour-based guidelines and modelling of 10-minute odour-based standards and guidelines until it consults further with industry. However, MOE did not agree to adopt either the European or American standards for odour measurement because of the high quality of the AIHA and ORTECH studies. MOE also did not agree to relax the 10-minute odour-based limits based on the 50 per cent ODT, stating that sensitive people may still find odours that exceed those limits to be a nuisance.

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MOE explained that the decisions on the two position papers protect local air quality, human health and the environment. The air quality standards, which are based on the latest scientific and toxicological research, consider the uncertainty of the hazards posed by the contaminants. MOE has applied the precautionary principle to ensure that an "adequate margin of safety exists" and advised that the new dispersion models improve the accuracy of the predicted impacts on the environment and are more conservative. According to MOE, the new odour framework approach reduces odour impacts on the environment and includes a more "holistic mixture" approach.

Other Information

In 2001, the ECO received an application for investigation under the *EBR* alleging that two kitchen cabinet manufacturers in Thornhill, north of Toronto, were emitting unpleasant odours several times a week into a densely populated area that included residences, four daycare facilities, schools and old age homes. The odours were the result of significant emissions of toluene and other toxic substances. The applicants noted that they had tried to resolve their concerns for several years by talking with the two kitchen manufacturers, and with the local MOE office and the minister's office. MOE denied the application because it was already investigating odour emissions from both facilities. In 2002, MOE advised the ECO that complaints regarding these facilities had declined substantially since 1995 and that "local land-use planning decisions have created a situation, where, barring total removal of the industrial operations, odours will occur from time to time." In recent years, public liaison committees were established to address air quality concerns with both manufacturers and odour abatement steps were taken at both facilities. In 2007, one of the manufacturers moved its operation to another location.

In a 2005 report prepared for the British Columbia government, RWDI Consulting Ltd (RWDI) researched the odour management practices of numerous jurisdictions across Europe, Australasia, the United States and Canada. RWDI found that the rationale for managing odour in most jurisdictions was avoidance of nuisance odours and in only two jurisdictions, avoidance of potential human health impacts.

Of the 22 American, Australian, Canadian and Asian jurisdictions surveyed, RWDI found that Ontario had defined ambient odour-based concentration criteria for by far the most compounds. RWDI also found that 46 European, American, Australian, Canadian and Asian jurisdictions have used odour panels to define ambient odour criteria. Averaging times for odour limits varied from less than a second to two hours, and frequency criteria varied from 97 to 99.9 per cent or was time-based. Often the ambient odour criteria applied to only wastewater treatment plants. In addition, most jurisdictions had a complaint management protocol. Although some jurisdictions only logged odour complaints, others investigated odour complaints only if certain criteria were met and still others were legally required to investigate all complaints.

ECO Comment

The ECO commends MOE for taking on this challenging and important initiative and for continuing to consult with stakeholders and the public on key aspects. Despite the lack of immediate tangible benefits to Ontarians, significant decisions have been made that will influence how odour is managed for the foreseeable future. Effective odour management is becoming increasingly important as residential development and other sensitive uses are being located closer to odour-producing sources, including new and expanding waste management and wastewater treatment facilities, to accommodate growth. At the same time, it is increasingly evident that odours are not just a nuisance – they can also have health effects and they can be symptoms of serious emissions. Consideration of the FIDOL factors will enable MOE to set odour-based limits that more closely reflect a contaminant's odorous nature and hopefully will reduce the number of complaints as facilities come into compliance. A stronger regulatory and policy framework will make it easier for MOE to add enforceable odour-based requirements to Cs of A (Air). It should also make it easier, although not necessarily less laborious, for MOE to investigate odour complaints and potential instances of non-compliance by the industrial sector.

The ECO agrees with commenters that an odour complaint management system should be a component of the Odour Policy Framework. MOE has indicated that one of its objectives is to reduce the number of odour complaints. However, unless a formal odour complaint management system is in place before the 10-minute odour-based limits are phased-in, MOE will not know if this objective is achieved.

Complainants should have confidence that their concerns are being logged, assessed, investigated and resolved. Facilities' owners should also be aware of complaints so that they can work with the community to resolve them and consider them when changing processes, equipment and adopting abatement measures. A formal odour complaint management system would also allow MOE to identify problem areas and trends in odour complaints.

The ECO also agrees with comments that land-use planning decisions must include greater consideration of odour impacts. Appropriate siting of residential areas and other sensitive uses, and odour-emitting facilities, taking into consideration prevailing winds, land forms, other odour-emitting sources in the area and separation distances, is the most effective tool available to minimizing or even preventing odour complaints. Locating residential areas and other sensitive uses next to odour-producing facilities or vice versa without fully understanding the odour issues is a recipe for future problems. A good example is the land-use decisions that led to residential areas, daycare facilities and other sensitive uses being neighbours with kitchen cabinet manufacturers in Thornhill, a situation that resulted in more than a decade of complaints and has taken considerable time, money and effort by all parties to address. In fact, the objective of Guideline D-6 was to prevent such a situation from occurring.

Although, in 2008/2009, the operating budgets of MOE's Air Program and enforcement activities were increased, the ECO believes that progress on the odour policy framework will continue to be slow. As discussed in the ECO's review of O. Reg. 419/05, MOE is challenged to meet the substantial needs of updating Ontario's air quality standards. The work required to develop an Odour Policy Framework including new odour-based standards and guidelines is substantial and requires significant expertise. In addition, as facilities apply for air approvals, additional work will be required to address odour considerations. The ECO will continue to monitor MOE's progress on updating air quality standards and odour-based limits.

Review of Posted Decision:

4.4 Amendments to Regulation 347 to Facilitate Waste Recycling, Use of Alternative Fuels and New and Emerging Waste Management Technologies

Decision Information:

Registry Number: RA06E0008	Comment Period: 61 days
Proposal Posted: July 19, 2006	Number of Comments: 47
Decision Posted: March 23, 2007	Comes into Force: March 23, 2007

Description

In an effort to encourage greater diversion of more wastes from final disposal (through reuse and recycling), as well as better management of residual waste in Ontario, the Ministry of the Environment (MOE) filed amendments to the General Waste Management Regulation – Regulation 347, R.R.O. 1990 – under the *Environmental Protection Act* (*EPA*) in March 2007. Specifically, these amendments are intended to:

1. Facilitate the recycling of certain wastes (set out below);
2. Encourage the use of alternative fuels – particularly, the use of waste biomass to produce ethanol and biodiesel, and the use of woodwaste as a fuel; and
3. Streamline approvals for pilot and demonstration projects for new waste management technologies, such as energy-from-waste facilities.

These amendments remove what many industry proponents view as "regulatory barriers" to the development of reuse, recycling and new technology projects. The amendments remove requirements for proponents to obtain Certificates of Approval for certain waste systems and waste disposal sites, and requirements for public hearings to be held for other waste projects. By removing these regulatory requirements, the amendments are intended to make it easier for proponents to develop and implement new recycling systems, alternative uses of waste and new disposal options (other than traditional landfill disposal).

Waste Recycling:

Exemption of Recyclable Materials from Part V of the EPA:

Part V of the *EPA* (which is the part of the Act that addresses waste) requires all persons who establish, alter, operate or otherwise use a "waste management system" or "waste disposal site" to first obtain a waste Certificate of Approval (C of A) from MOE. Regulation 347 under the *EPA* explicitly sets out which wastes are subject to the waste C of A requirements under Part V of the *EPA* and which wastes are exempt.

To facilitate the recycling of certain materials, MOE amended Regulation 347 to add the following materials to the list of exempt wastes:

- Waste paint or waste coatings that will be recycled into paint;
- Emission control dust that is transferred directly to a smelter for recycling;
- Spent activated carbon that is transferred directly to a site where it will be reactivated;
- Metal bearing waste (other than lead acid batteries or aqueous waste) that is transferred directly to a smelter for recycling;
- Printed circuit boards that will be recycled by a smelter; and
- Crumb Rubber that will be recycled into products (other than fuel products).

Prior to the 2007 amendments, all of these items were treated as "waste" and therefore generators, handlers, carriers and recyclers of these materials were all required to obtain a waste C of A.

To qualify for the exemption, however, the regulation requires the generators of these waste materials (with the exception of waste paint, waste coatings, printed circuit boards and crumb rubber) to ship the wastes directly to the site where they will be recycled. If these wastes are to be collected, stored, handled or processed at an intermediate site prior to recycling, the waste systems will continue to require Cs of A.

In addition, the regulation requires the carriers of waste paint, waste coatings and emission control dust, as well as the owners or operators of any intermediate sites that store or process waste paint or waste coatings, to have in their possession a document that identifies the specific site that has agreed to accept the materials for recycling and the use that will be made of the material.

Exemption of Waste Management Systems from Part V of the EPA:
The ministry also amended Regulation 347 to exempt some of the intermediate waste management systems that collect, handle, store, transport or transfer certain electronic and related wastes, which are destined for a recovery facility, from the requirement to obtain a waste C of A. This exemption applies to the following items that are destined for a recovery facility:

- Intact batteries;
- Mercury containing materials (e.g., electrical switches, thermostats, fluorescent lamps);
- Intact Waste Electrical and Electronic Equipment (WEEE); and
- Printed circuit boards.

To qualify for this exemption, the regulation requires the carriers of batteries and mercury waste, as well as the owners or operators of any intermediate sites that collect or store these wastes, to have in their possession a document that identifies the recovery facility that has agreed to accept the material.

During the proposal stage, the ministry had proposed to also exempt intermediate sites that dismantle WEEE and circuit boards. MOE suggested that this exemption would facilitate the salvaging of reusable components and the recovery of recyclable materials. However, this exemption was removed in the final regulation in response to stakeholder concerns (see the public participation section below).

Waste Materials Deposited on Land for Beneficial Purposes:
Sites where waste is deposited on land generally require a waste C of A. In some cases, however, placement of waste materials on land is considered to be for a "beneficial purpose", rather than waste disposal.

The ministry has determined that the depositing of waste asphalt, waste asphalt shingles and waste glass on land for the construction of walkways, roads and parking areas are "beneficial uses", and not disposal. Accordingly, the ministry amended Regulation 347 to exempt the deposition of waste asphalt, waste asphalt shingles and waste glass for these purposes from the requirement to obtain a waste C of A.

Onsite Pre-processing Before Recycling:
Prior to the amendments, manufacturers who wished to recycle waste materials that they generated, but which needed to be processed before the materials could be recycled (i.e., fed back into the manufacturing process) were required to obtain a waste C of A to process the waste for recycling. To remove this disincentive to recycling, Regulation 347 was amended to now exempt waste that is generated and pre-processed onsite before it is used from the waste C of A requirement.

Alternative Fuels:
The Production of Ethanol and Biodiesel from Waste Biomass:
To facilitate the production of ethanol and biodiesel, the ministry amended Regulation 347 to exempt "waste biomass" that will be used to produce ethanol or biodiesel from the requirement to obtain a waste C of A.

The amendments to the regulation define "waste biomass" as "organic matter that is derived from a plant or animal, that is available on a renewable basis, and that is,

(a) waste from harvesting or processing agricultural products or forestry products,
(b) waste resulting from the rendering of animals or animal by-products,
(c) solid or liquid material that results from the treatment of wastewater generated by a manufacturer of pulp, paper, recycled paper or paper products, including corrugated cardboard,
(d) waste from food processing and preparation operations, or
(e) woodwaste."

Prior to the amendments, most waste management systems or sites that handled, processed, stored, transferred, transported or disposed of these wastes were required to obtain a waste C of A. This approval requirement no longer applies to any waste systems that manage waste biomass that will be converted into ethanol or biodiesel.

In the proposed regulation, the exemption only applied if the waste biomass was to be transported directly to the site where it was to be used to produce ethanol or biodiesel. In response to stakeholder comments, the regulation was revised to broaden the exemption to include waste biomass that may be stored, handled or pre-processed at an intermediate site. This revision was made to address comments that pre-processing of waste biomass may be needed before it can be used to make ethanol or biodiesel.

Use of Woodwaste as an Alternative Fuel:
Previously, Regulation 347 exempted woodwaste combustor sites that combust less than 100 tons of woodwaste per day as a fuel or fuel supplement from the requirement to obtain a waste C of A. The amendments to Regulation 347 now allow woodwaste combustor sites to combust any quantity of woodwaste as a fuel or fuel supplement without a waste C of A (subject to certain restrictions).

In addition, new provisions were added to Regulation 347 to exempt intermediate waste systems that collect, handle, store, transfer or process woodwaste that is destined for a woodwaste combustor site and that will be combusted for purposes other than waste disposal (such as the generation of energy).

Pilot and Demonstration Projects:
To facilitate the development of pilot and demonstration sites for new and emerging waste management technologies that process or dispose of municipal waste, such as energy-from-waste (EFW) technologies, the ministry announced that it would be implementing a streamlined waste approvals process for "municipal waste pilot project sites".

Definition of "Municipal Waste Pilot Project Site":
The amendments to Regulation 347 define "municipal waste pilot project sites" as waste disposal sites, other than a landfill or dump, that process or dispose of municipal waste, and that are established to:

(a) assist in the design of a technology that is used to process or dispose of municipal waste;
(b) assess the merits of a technology that is used to process or dispose of municipal waste; or

(c) demonstrate the merits of a technology that is used to process or dispose of municipal waste.

This definition of a municipal waste pilot project is intended to capture, primarily, "thermal treatment" sites, which are defined as sites that treat waste through "incineration, gasification, pyrolysis or plasma arc treatment," but this definition could also include other new waste processing technologies, such as new composting technologies.

Exemption of Municipal Waste Pilot Projects from the Mandatory Hearing Requirement:
As one of the measures to facilitate the establishment of new pilot projects, the ministry amended Regulation 347 to exempt certain "municipal waste pilot project sites" from the mandatory hearing requirement under the *EPA*, which normally applies to larger waste disposal sites. The regulation limits this exemption to municipal waste pilot projects that have a maximum processing capacity of 75 tonnes per day of municipal waste, and a maximum operating period of three years. However, the regulation allows proponents to apply to the ministry during the second half of the facility's permitted operating term to extend the project duration up to a total operating period of five years.

Streamlining of the Approvals Process under Part V of the EPA:
In the Registry proposal notice for the amendments to Regulation 347, the ministry stated that the approvals process for waste Cs of A for the municipal waste pilot projects will be streamlined. However, other than removing the mandatory hearing requirement for some municipal waste pilot projects, the ministry has not stated whether additional streamlining of the waste approvals process is intended, and if so, what this would entail.

Complementary Amendments for Pilot Projects under the EAA:
In conjunction with the amendments to Regulation 347, MOE also made amendments to two regulations – O. Reg. 116/01 (Electricity Projects) and Regulation 334, R.R.O. 1990 (General) – under the *Environmental Assessment Act* (*EAA*) to further facilitate the development of "municipal waste pilot project sites". These amendments exempt "municipal waste pilot project sites" from the requirement to conduct an environmental assessment under the *EAA*. Previously, most electricity generation facilities that burned municipal waste as their primary power source were required to conduct an individual environmental assessment pursuant to O. Reg. 116/01 under the *EAA*.

On the same day, the ministry also filed another regulation – the new Waste Management Projects Regulation (O. Reg. 101/07) under the *EAA* – which facilitates the development of "thermal treatment" sites more generally (not just pilot projects). This new regulation also exempts any pilot project for a "thermal treatment" site (i.e., not just those facilities that treat municipal waste) that will operate for a maximum of 12 months from the requirements under the *EAA*. (For more on the Waste Management Projects Regulation, see the "Other Information" section below, as well as the full review of that regulation in section 4.6 of this Supplement).

Implications of the Decision

Elimination of Approval Requirement may Encourage Waste Recycling and Waste Diversion:
The amendments to Regulation 347 remove the requirement to obtain a waste C of A for certain waste systems that are part of a recycling process for a number of materials (i.e., waste paint, waste coatings, emission control dust, spent activated carbon, metal bearing waste, crumb rubber, printed circuit boards, batteries, mercury containing materials, WEEE, waste asphalt, waste asphalt shingles and waste glass).

The removal of this regulatory requirement may encourage the establishment of more recycling systems, and thus could potentially increase the amount of waste that is diverted from disposal in Ontario. In addition to the environmental benefits of reducing the amount of waste that is disposed (such as reducing the amount of land required for landfill sites or reducing the amount of air emissions released from waste incinerators), the recycling of materials may, in some cases, also result in a reduction in the amount of new raw resources that are required in the production of new materials.

Elimination of Approval Requirement may Encourage the Production of Alternative Fuels:
The amendments to Regulation 347 also remove the requirement to obtain a waste C of A for any waste system that is involved in the conversion of waste biomass into ethanol or biodiesel. The removal of this regulatory requirement may encourage the establishment of facilities that produce ethanol and biodiesel.

While there is still no consensus among the scientific community regarding the environmental benefits of alternative fuels such as ethanol and biodiesel, the use of waste biomass (versus other sources, such as corn) to produce ethanol and biodiesel is generally believed to be environmentally preferable to traditional fossil fuels. According to MOE, the use of ethanol and biodiesel from waste biomass is a clean "greenhouse gas neutral" source of energy (i.e., the carbon dioxide emissions released by ethanol or biodiesel production and combustion are offset by the amount of carbon dioxide absorbed by the biomass during its lifetime and the amount of carbon dioxide it displaces from fossil fuels that would otherwise be combusted). MOE also noted that using a renewable source, such as waste biomass, is preferable to the use of non-renewable resources, such as oil and coal.

Elimination of Approval Requirement Removes an Effective Regulating Tool:
Generally, where waste Cs of A are required, the ministry reviews the applications for the Cs of As to ensure that the applicants are proposing viable and safe waste systems. In addition, MOE usually imposes conditions in the C of A, such as limits on the volume of waste that may be stored on a site and requirements for operators to develop recycling and disposal plans to ensure that the operators are able to properly dispose of all the waste collected. The ministry also often imposes requirements for owners to provide financial assurance to cover any costs that may arise if, for example, the owner were to abandon the waste site. The ministry may also impose standards or conditions for operation, such as requiring certain materials to be stored indoors, covered and/or on impermeable pads.

However, owners and operators of waste systems that collect, store, handle, transport or process the newly exempted waste materials will no longer be required to obtain a waste C of A for their operations. The removal of this requirement will result in the loss of an effective regulating tool for the ministry. MOE will no longer review or approve the exempt waste management operations, or impose terms or conditions on their operations to ensure that the wastes are managed pursuant to proper environmental, health and safety standards. Additionally, the regulation itself imposes no general conditions or standards for the exempt operations. Yet, many of the wastes that have been exempted from the waste C of A requirement have the potential to cause significant environmental harm if not properly managed.

In addition, the removal of the waste C of A requirement will also result in a loss of public notice, participation and appeal rights for these waste systems, which otherwise would exist under the *Environmental Bill of Rights* (*EBR*).

Other Approval Requirements Continue to Apply:
It should be noted, however, that all of the waste systems will continue to be subject to other government approval requirements (such as Cs of A for air emissions under the *EPA*, where required) just as before.

Elimination of Approval Requirement Reduces MOE's Ability to Track Wastes:
With the removal of the waste C of A requirements, the ministry is losing access to information regarding the generation, movement and disposal of many waste materials. For example, the exemption from the waste C of A requirement for all waste systems for certain wastes (such as crumb rubber that will be recycled) will virtually eliminate MOE's ability to track the movement of these wastes. Similarly, the exemption from the waste C of A requirement for some waste systems that collect, handle, store and transport other wastes (such as batteries, circuit boards and WEEE products) will greatly reduce MOE's ability to track those wastes.

For a few of the exempt wastes, alternate tracking requirements were subsequently implemented through the Municipal Hazardous or Special Waste (MHSW) Program Plan. The MHSW Program Plan is a plan developed by Waste Diversion Ontario and approved by MOE in February 2008, which introduces diversion plans for certain hazardous and "special" wastes. This Plan establishes new requirements, as of July 1, 2008, for waste "stewards" to track the quantities and flow of certain MHSW materials –

including waste paints, waste coatings and dry cell batteries – from collection to final destination. The MHSW Program Plan will also apply to other materials, including batteries and mercury-containing materials, at some future date still to be determined. In addition, in April 2008, MOE posted a proposal on the Registry for a similar waste diversion program plan for WEEE materials. If approved, the WEEE Program Plan will include tracking requirements for WEEE materials.

However, for the majority of exempt wastes, there is no substitute reporting or tracking requirements in place. Moreover, the amendments to the regulation only require carriers and waste operators of some of the exempt wastes to carry in their possession documentation that confirms that the waste is destined for recycling. Without proper tracking information for all wastes, MOE will have a reduced ability to track trends for waste generation and diversion levels in the province.

More importantly, the lack of tracking information will make it much more difficult for MOE to monitor and enforce waste operations to ensure that wastes (such as WEEE products) are being recycled as required, and not being sent to landfills or exported to developing countries with poor environmental regulations (contrary to international obligations under the Basel Convention). Without information identifying where waste systems even exist, the ministry will be significantly curtailed in its ability to effectively monitor and enforce compliance by these facilities with environmental laws.

Public is Virtually Excluded from the Pilot Project Approvals Processes:
The removal of the mandatory hearing requirement under the *EPA* for municipal waste pilot projects, combined with the new exemptions from the environmental assessment process under the *EAA*, results in a significant loss of public participation rights. MOE Directors maintain discretionary power to order a hearing for pilot projects that they believe would benefit from a hearing; however, the ministry has not published any guidance or criteria to help determine when a Director may elect to use this discretionary authority to assign a pilot project to a hearing under the *EPA*.

Moreover, the exemption of these projects under the *EAA* results in a further removal of public participation opportunities under the *EBR*. Section 32 of the *EBR* exempts the ministry from the requirement to post proposals on the Environmental Registry for public comment for Cs of A related to projects that are exempted from the *EAA*. All of these various exemptions mean that, in most cases, the public will no longer have an opportunity to meaningfully comment on or participate in the development of new pilot projects.

The loss of public participation opportunities for these projects could be quite significant. As MOE has stated, the new technologies that will generally be used in the "municipal waste pilot project sites" (such as incineration, gasification, pyrolysis and plasma arc technologies) "are not well proven for use with municipal waste." In addition, as these unproven facilities may be permitted to operate for up to three years (with a possible extension up to five years), they present the possibility of having significant effects on public health and the environment.

Streamlined Approval Process should help Facilitate Development of Pilot Projects:
The elimination of most public participation requirements from the planning and approvals stage for new municipal waste pilot projects should, however, facilitate the development of these new pilot projects. Given that these types of projects (such as EFW facilities) tend to be very controversial, removing the public participation components should greatly facilitate the ability of proponents to move through the approval phases faster and more easily.

Pilot and demonstration facilities can play an important role in providing information that is necessary to fully evaluate new technology, where sufficient data does not yet exist. MOE hopes that by facilitating the development of innovative new technologies, it can help improve how waste is managed in Ontario.

Public Participation & *EBR* Process

MOE posted a proposal notice for the proposed amendments to Regulation 347 on the Environmental Registry in July 2006 and provided the public with a 61-day comment period. A few commenters requested that the ministry extend the comment period on account of the complexity of the proposed regulatory amendments, their broad implications, and the fact that the comment period fell during the summer when many people were away. MOE turned down this request for an extended comment period.

As a result of the public consultation on the proposal, the ministry received 47 comments. Many industry commenters expressed support for the ministry's efforts to remove regulatory barriers to implementing better waste management facilities and practices in Ontario. Nonetheless, many of these commenters disagreed with some of the proposed amendments, as well as made recommendations for further reforms. Many other commenters, mostly environmental groups, argued that most of the proposed amendments to remove regulatory requirements were not appropriate. The key comments provided by the commenters are summarized below.

A Comprehensive Waste Management Strategy is Needed:
A range of commenters, including environmental groups, industry groups and municipal associations, commented on the pressing need for the province to develop a comprehensive waste management strategy for Ontario. These commenters urged the government to address the overall issue of waste management strategically and from a provincial policy perspective before developing individual piecemeal approaches to waste management. The commenters stated that once a comprehensive policy is developed, any new measures should then be evaluated in the context of the province's diversion goals and priorities.

Reforms Fail to Focus on the "3Rs" Hierarchy:
Many environmental groups commented that the proposal generally fails to adequately focus on the provincial objective of facilitating the "3Rs" – i.e., reducing, reusing and recycling materials. These commenters stated that the focus of the government's efforts should first be on reducing the generation of waste at the source – which has become an overwhelming problem in Ontario – and second, on improving diversion through the reuse and recycling of materials, rather than prioritizing the facilitation of disposal projects.

Several of these commenters stated that "thermal treatment" processes (including EFWs) are "disposal" processes, not diversion, recycling or "recovery". Accordingly, the use of thermal treatment sites for anything other than the disposal of true residual waste (i.e., after best practices in recycling and composting) should not be encouraged. Otherwise, thermal treatment processes may undermine efforts to divert waste from disposal through reuse, recycling and composting.

Removal of C of A Requirement will Result in a Loss of Scrutiny:
Several environmental groups expressed concern that the removal of the waste C of A requirement for various wastes will result in a weakening of ministry scrutiny and oversight of activities that have the potential to cause environmental harm. These commenters also expressed concern that the removal of the waste C of A requirement will result in a loss of important public notice, participation and appeal rights that formerly existed in respect of these waste disposal sites under the *Environmental Bill of Rights.*

Removal of C of A Requirement may Result in Inability to Track Wastes:
A number of commenters from various stakeholder groups specifically opposed the amendments that remove the waste C of A requirement for waste management systems that collect, handle, store and transport batteries, mercury-containing equipment, circuit boards and WEEE products. These commenters expressed concerns that the wholesale exemption of these waste systems from the waste C of A requirement may eliminate the ministry's ability to identify who is generating, handling, storing or transporting these wastes, and more significantly, its ability to track the ultimate disposal of these waste materials. The commenters suggested that these waste materials should be properly tracked and reported – from the point of generation to final disposition – to ensure that they are handled, transported, processed and disposed of pursuant to proper environmental, health and safety standards.

Many of these commenters expressed serious concern that collection (or "take back") operations for WEEE and other electronic wastes, which will no longer be required to establish a recycling and disposal plan, may accumulate large quantities of wastes intended for recycling, and then either dispose of these hazardous materials inappropriately (such as sending them to a landfill or exporting them to developing countries where recycling processes are unregulated), or simply abandon the waste storage sites. Accordingly, several commenters suggested that, to ensure that these materials do in fact end up properly recycled and disposed of in an environmentally sound manner, the regulation should specify minimum reporting and operating requirements (such as storage duration and volume) for waste systems that collect and handle exempt wastes.

Dismantling of WEEE and Circuit Boards should Continue to be Regulated:
In the draft amendments to Regulation 347, the ministry had proposed to exempt sites that are used in the dismantling of intact WEEE and circuit boards from the requirement to obtain a waste C of A. Virtually all commenters – from every type of stakeholder group – expressed strong opposition to this proposed amendment.

Commenters stated that the dismantling of WEEE and circuit boards presents significant risks to both human health and the environment, as these products contain a wide range of hazardous materials that need to be safely managed. All of these commenters argued that WEEE processing sites should continue to be regulated through waste Cs of A to ensure that safe, environmentally responsible practices will be used. In addition, a number of commenters expressed concern that, without regulatory controls, the ministry may be facilitating sham operations that perform minimal material recovery and then either export the remaining waste to developing countries where environmental, health and safety standards tend to be very low, or send it to landfill.

In response to these comments, MOE removed the proposed exemption for sites that disassemble WEEE and printed circuit boards from the regulation.

The "Beneficial Use" Exemption should be Subject to Standards:
A few commenters expressed concerns regarding the exemption from the waste C of A requirement for the deposition of materials (i.e., asphalt, shingles and glass) on land for beneficial uses, without the ministry having established any standards to regulate how the materials are to be deposited. These commenters raised the highly controversial issue of the depositing of paper sludge biosolids on land as an example that demonstrates the need to establish some technical standards to ensure that the deposition of materials is, in fact, a "beneficial use", and not simply an inappropriate deposition of "waste" on land.

Exemption for "Waste Biomass" should include Storage and Pre-processing:
In the proposed regulation, the exemption for "waste biomass" only applied if the waste was sent directly to the site where it was to be used to produce ethanol or biodiesel. Several stakeholders commented that pre-processing of waste biomass is typically required before it can be used to make ethanol or biodiesel. In response to these comments, MOE broadened the exemption to include waste biomass that is stored or pre-processed at an intermediate site.

Food Processing Wastes should be Explicitly Exempted:
A few industry commenters expressed concerns that the amendments may inadvertently remove an existing exemption for organic wastes from food processing and preparation that are sent to facilities for rendering or recycling. To address these concerns, MOE added a new provision in the final regulation that explicitly states that these organic food wastes are exempt from the requirement to obtain a waste C of A.

Woodwaste should not be Encouraged as a Fuel Source:
Several environmental groups were opposed to the inclusion of "woodwaste" and particularly "waste from harvesting or processing agricultural products or forestry products" in the definition of "waste biomass". These commenters were concerned that the waste C of A exemption will encourage persons to use waste from forest harvesting to produce alternative fuels rather than leaving the residues in the forest where it serves important biological and ecological functions (such as returning nutrients to the soil).

These commenters suggested that only woodwaste from milling and processing operations should be included in the exemption for "waste biomass" that is to be used to produce ethanol or biodiesel. The commenters stated that woodwaste from cutovers of forest management operations should be excluded from the definition of "waste biomass", at least until the government has developed a clear policy on the use of forest biomass.

These commenters also stated that the amendments that remove the cap on the amount of woodwaste a combustor site may burn may increase the demand for forest fibre as a source of fuel, and thus reduce the amount that is left behind or otherwise used to produce wood or forest based products.

Storage Limits on Woodwaste Combustor Sites should be Removed:
Several commenters requested that the ministry remove the storage limit for woodwaste combustor sites, stating that the existing limit (i.e., 500 cubic meters of woodwaste) does not allow facilities to accumulate woodwaste during the summer months (when energy needs are lower) for use in the combustor operations in the winter (when energy needs are higher). Conversely, a few commenters stated that changes should not be made on the storage limit, as the removal of this limit creates a serious risk of fire.

As a result of the comments, MOE decided to change the existing 500 cubic metre quantity limit for woodwaste storage to a site specific limit that allows up to six months combustor capacity. In addition, MOE also changed the existing six month time limit for woodwaste storage to an 18 month time limit to better enable facilities to acquire the needed woodwaste to start-up a new woodwaste combustor.

The Permitted Duration and Size of Pilot Projects should be Increased:
Several industry and municipal commenters expressed support for the pilot project provisions stating that they should help reduce some of the uncertainty in the approvals process; however, many of these commenters suggested that the exemption should be expanded to allow pilot and demonstration sites to operate for up to 10 years and process up to 100 or 150 tonnes of waste per day. These commenters stated that longer operating periods and larger capacities are required to obtain more relevant emission testing results. These commenters also argued that the proposed tonnage limit for pilot projects of 75 tonnes per day and the operating limit of just three to five years are too low to encourage the development of new pilot or demonstration projects in Ontario. These commenters stated that the onerous cost per tonne for such short-term pilot facilities will prevent municipalities from engaging in these projects.

Amendments will Result in a Loss of Public Consultation Rights for Pilot Projects:
Numerous environmental groups expressed concerns about the exemption for pilot projects from the mandatory hearing requirements under the *EPA*. These commenters stated that new technologies (such as incineration, gasification, pyrolysis and plasma arc technologies) are generally unproven with unknown health and environmental effects, and thus, these technologies should be subject to more – not less – scrutiny.

Moreover, these environmental groups found the loss of the mandatory hearing requirement particularly troubling given the fact that most of these pilot projects are also no longer required to conduct an environmental assessment. Accordingly, these commenters stated that the public will no longer have a real opportunity to raise their concerns regarding new pilot projects. One commenter argued that the exemption from the public hearing requirement is contrary to MOE's Statement of Environmental Values (SEV), which states that the ministry "is committed to public participation and will foster an open and consultative process in the implementation of the SEV."

In addition, several commenters argued that, once a pilot project has been approved and large investments have been made in the project, it is unlikely that MOE would subsequently deny the proponent final approval if it applies for permanent project status. Therefore, these commenters stated that a rigorous approval process, including full public consultation, should be required at the initiation of the pilot project.

Other Waste Materials should be Exempted:
Numerous commenters requested that other specific waste materials should be exempted from the requirement to obtain a waste C of A because the materials are either "recyclable" or appropriate for use in producing alterative fuels. For example, many commenters suggested that "green bin" organics (i.e., source separated organics) should also be included in the exemption for "waste biomass" that is used to produce ethanol and biodiesel. MOE responded that green bin organics were not suitable (i.e., too wet and variable in content) for processing into biodiesel or ethanol, and that they are better used for composting programs, which is a priority method for managing waste. MOE also stated that the inclusion of other wastes in the regulation, which were not included in the Registry proposal, is outside the scope of this proposal.

SEV

MOE provided a brief statement explaining how it considered its Statement of Environmental Values (SEV). The briefing note stated that the ministry's waste initiatives are consistent with MOE's environmental protection strategy whose priority is to, first, prevent and minimize the creation of waste, and second, prevent and minimize the release of pollutants and waste into the environment. MOE further stated that these initiatives encourage the use of the 3Rs (reduction, reuse and recycling) to divert materials from disposal. MOE also noted that the waste initiatives consider social, economic and other factors, by supporting scientific research, the development of new technologies and processes, and the development of green industries in Ontario.

Other Information

The New Waste Management Projects Regulation under the EAA:
In March 2007, on the same day that the amendments to Regulation 347 were filed, the government also filed a new regulation under the *EAA* that relaxes environmental assessment (EA) requirements for certain waste management projects. This regulation established different assessment streams for different types of waste projects. This regulation includes the following designations:

- Small landfills (with a capacity under 40,000 cubic metres), small new waste technology pilot projects, and recycling facilities that generate less than 1,000 tonnes of residual waste per day for disposal, are all exempt from the EA requirements.
- Mid-size landfills (with a capacity between 40,000 and 100,000 cubic metres) and most Energy from Waste (EFW) facilities are now subject to an expedited "Environmental Screening Process" rather than a full EA.

For a complete description of this regulation, see the decision review in section 4.6 of this Supplement.

Extended Producer Responsibility Systems (EPRS):
The proposal notice for the amendments to Regulation 347 also included a detailed "conceptual proposal" for a proposed new approach to facilitate the development of more programs based on the principle of "Extended Producer Responsibility", which would establish systems and programs for certain wastes called "Extended Producer Responsibility Systems" (EPRS). In the proposal notice, MOE stated that the ministry wished to support the development of EPRS through the establishment of simpler regulatory mechanisms.

The ministry sought public comments on the EPRS proposal, and many commenters provided extensive feedback on this proposal during the comment period. However, the ministry did not provide any comments on the Registry decision notice regarding the outcome of this particular proposal. MOE simply stated that any future initiatives in this area would be subject to further consultation.

Other MHSW Program Developments:
In February 2008, MOE approved the Municipal Hazardous or Special Waste (MHSW) Program Plan, which was developed by Waste Diversion Ontario to improve diversion of hazardous and special waste materials. Some of the waste materials addressed in this plan include materials – such as paints,

batteries and mercury-containing materials – that were exempted in the amendments to Regulation 347. For more information on the MHSW Plan, see section 4.17 of this Supplement.

Other WEEE Program Developments:
On April 9, 2008, MOE posted a proposal notice for a new Waste Electrical and Electronic Equipment Program Plan, which was developed by Waste Diversion Ontario. This proposed program provides for the management of WEEE generated in Ontario, and focuses on approaches to diverting these wastes from disposal.

ECO Comment

The ECO supports the goals of MOE's 2007 amendments to encourage more waste diversion and better management of residual waste in the province. Indeed, these amendments follow on some of the suggestions made in MOE's 2004 waste diversion discussion paper, which set a goal to divert 60 per cent of Ontario's waste by 2008. However, these amendments comprise just one component of a broader strategy that is needed to appreciably reduce waste disposal rates in the province. The most recent available data (based on 2006 figures) states that Ontario is still diverting only 38 per cent of its municipal residential waste. Accordingly, as recommended in past Annual Reports, the ECO continues to urge the ministry to develop a comprehensive waste management policy to seriously address disposal and diversion strategies for the province.

Moreover, while the ECO believes that promoting waste diversion is a very laudable goal, such efforts should not come at the expense of other environmental objectives. The ECO supports the removal of regulatory barriers (such as the removal of the requirement to obtain a C of A) in appropriate circumstances to encourage operators to engage in more waste recycling. However, the ECO is concerned about the total absence of any regulatory oversight for most of the newly exempted wastes – which includes wastes that have the potential to cause significant environmental harm if not properly managed.

The ECO believes that MOE should retain some oversight of the management of the exempt wastes to ensure that these wastes are managed in a safe and environmentally appropriate manner, and to ensure that the wastes are truly being recycled as intended (and not being improperly dumped or exported to other nations with minimal environmental standards). While some of the exempt wastes are being addressed through new program plans (such as waste paints under the MHSW Program Plan), the ministry has not yet established timelines or, in some cases any plans at all, for addressing the remaining exempt wastes. Accordingly, the ECO urges the ministry to develop new requirements that set out some operating and reporting requirements for operators and owners of exempt waste management systems as quickly as possible.

In addition, the ECO is concerned about the complete removal of public participation rights in respect of municipal waste pilot projects. The removal of the mandatory hearing requirement under the *EPA* for these pilot projects, combined with the exemption from the environmental assessment process under the *EAA* and the exemption from the public participation requirements under the *EBR*, will deprive the public of an opportunity to meaningfully comment on or participate in the development of most new pilot projects.

While new waste technologies may be an important part of the waste management strategy, these pilot projects can involve unproven technologies with unknown, but potentially significant, health and environmental affects. Accordingly, the ECO believes that these particular projects should continue to be subject to public consultation commensurate with their level of risk. The ECO urges MOE to take full advantage of its authority to grant discretionary hearings for these pilot projects and to post proposal notices on the Environmental Registry for Cs of A relating to these projects for full public comment. Without adequate transparency, public acceptance of these new technologies may be significantly hampered.

Review of Posted Decision:

4.5 A Review of the Environmental Penalties, Spill Notification and Spill Prevention and Contingency Plan Regulations and Guidelines

Decision Information:

Registry Number: RA06E0013
Proposal Posted: October 6, 2006
Decision Posted: June 8, 2007

Comment Period: 98 days
Number of Comments: 55
Comes into Force: Regulations being phased-in between August 1, 2007 and December 1, 2008

Description

In June 2005, the Ontario government passed the *Environmental Enforcement Statute Law Amendment Act, 2005* (*EESLAA*), which contained various amendments to the *Environmental Protection Act* (*EPA*) and the *Ontario Water Resources Act* (*OWRA*) designed to help address the problem of spills in Ontario. The need for such a statute was identified by the Ontario government after a series of large, high profile industrial spills occurred along the St. Clair River in 2003 and 2004, causing considerable concern and outcry for something more to be done to prevent spills in the province. (For more on the *EESLAA*, please see pages 102-107 of the ECO's 2005-2006 Annual Report).

In June 2007, the Ministry of the Environment (MOE) passed four new regulations that enable the implementation of the remaining *EESLAA* provisions, which could not come into force until those supporting regulations were developed. At the same time, MOE also finalized a number of new guidance documents to supplement these regulations. The goals of these regulations and guidelines are to encourage companies to do more to prevent spills and to respond quickly and effectively when spills do occur, and to ensure that those who are responsible for the spills are the ones paying the penalty.

Environmental Penalties – O. Reg. 222/07 and O. Reg. 223/07:
One of the main components of the government's spill reduction plan included in the *EESLAA* was the introduction of administrative financial penalties, known as "Environmental Penalties" (EPs). The *EESLAA* introduced new provisions to the *EPA* and *OWRA* that allow MOE Directors to issue an order to a "regulated person", requiring that person to pay a penalty in relation to a spill, unlawful discharge or other prescribed contravention under the *EPA* or *OWRA*.

While the *EESLAA* established the concept and overall framework for the EPs, the two new EP regulations – O. Reg. 222/07 under the *EPA*, and the corresponding O. Reg. 223/07 under the *OWRA* – provide the important details of how, when and to whom the EPs may be applied.

MOE also established the following five new guidance documents to support the implementation of the EP regulations:

- The Guideline for Implementing Environmental Penalties;
- The Procedure for the Calculation of the Monetary Benefit Component of Environmental Penalties;
- Environmental Penalties – Code of Toxic Substances;
- Settlement Agreements – A Guide to Submitting Beyond Compliance Projects and Requesting Abatement Measures; and
- The new Compliance Policy: Applying Abatement and Enforcement Tools (Policy F-2), to replace the ministry's older Compliance Guideline F-2, last updated in 2001.

Spill Prevention and Contingency Plans – O. Reg. 224/07:
The *EESLAA* also introduced a new provision to the EPA that requires all "regulated persons" to develop and implement spill prevention and contingency plans (SPCPs) to prevent or reduce the risk of spills, and to prevent, eliminate or ameliorate any adverse effects that may result from spills. The new Spill Prevention and Contingency Plans Regulation (O. Reg. 224/07), which comes into force on September 1, 2008, enables this provision of the *EPA* to be implemented.

The SPCP regulation provides detailed requirements regarding what information must be included in a SPCP. The regulation requires that each SPCP include:

- General information that is needed when responding to a spill (such as contact information for persons responsible for responding to spills, and detailed descriptive information and drawings related to the plant).
- Spill Prevention Plans that: identify all potential spills that are reasonably foreseeable and have the potential to cause an adverse effect; assess the likelihood and risk of each identified spill; identify vulnerable areas in the vicinity of the plant that may be affected by a spill; and identify procedures that may prevent or reduce the risk of spills occurring.
- Spill Response Plans that: identify steps that will be taken in response to spills to prevent or eliminate adverse effects; identify steps that will be taken to monitor the movement of spilled pollutants; identify spill response teams and procedures; establish procedures to ensure that spill-response personnel are properly trained; and establish procedures to ensure that spill-response equipment and material are regularly inspected and maintained.

This regulation also imposes an obligation on officers and directors of corporations to conduct an annual review of its SPCP. The ministry also developed the "Guideline for Implementing Spill Prevention and Contingency Plans Regulatory Requirements" to assist regulated persons in developing their SPCPs in accordance with the regulatory requirements.

Spill Notification Amendments – O. Reg. 225/07:
MOE also enacted O. Reg. 225/07, which amends O. Reg. 675/98 – Classification and Exemption of Spills Regulation – under the *EPA*. Ontario Reg. 225/07 introduced new provisions that specify the requirements for reporting spills and discharges to the ministry's Spills Action Centre (SAC). The ministry states that the regulatory amendments simply codify the existing spill reporting practices and requirements (such as the content of the information that must be reported) already being used by SAC.

Ontario Reg. 225/07 also amended the provisions that exempt certain spills from the reporting requirements. Under the amended O. Reg. 675/98, a spill is now non-reportable if it is identified as "non-reportable" in a SPCP in accordance with the new SPCP regulation. This exemption applies to relatively small and manageable spills that fall below a specified threshold quantity established in a SPCP. MOE also updated its supporting document entitled "Spills Reporting: A Guide to Reporting Spills and Discharges" to provide guidance on the spill reporting requirements.

Table 1: Implementation Schedule

Regulation	Implications	Date in Effect
EP Regulations – Phase I (O. Reg. 222/07 and O. Reg. 223/07)	More serious offences become subject to EPs	August 1, 2007
EP Regulations – Phase II (O. Reg. 222/07 and O. Reg. 223/07)	Less serious offences become subject to EPs	Dec. 1, 2008
Spill Classification, Exemption and Reporting Regulation (O. Reg. 225/07)	Amends existing spill reporting regulation, O. Reg. 675/98	August 1, 2007
SPCP Regulation (O. Reg. 224/07)	Requires all regulated persons to establish a SPCP	Sept. 1, 2008

Implications of the Decision

The Regulations are Intended to Reduce Spills and Encourage more Effective Responses:
The objectives of the SPCP and EP regulations are to reduce the number of spills and discharges in the province, and where spills and discharges do occur, to reduce any resulting harm to the environment and human health. To meet these objectives, the ministry anticipates that the imposition, or mere threat, of EPs will encourage regulated companies to:

(a) Take steps to prevent spills and discharges;
(b) Take steps to mitigate the effects of spills and discharges on the environment and human health;
(c) Implement environmental management systems; and
(d) Take steps for the protection of the environment beyond what is legally required (pursuant to "settlement agreements" – discussed below).

Similarly, the amendments to the spill reporting regulation are intended to ensure that all significant spills are properly reported so that any resulting harm to the environment and human health may be minimized.

EPs and SPCP requirements only apply to "Regulated Persons":
The *EESLAA* provided that MOE Directors could only issue EPs to "regulated persons" as prescribed in the EP regulations. The EP regulations have defined a "regulated person" as a person who owns or operates a plant that is:

- a MISA (Municipal Industrial Strategy for Abatement) facility that is either listed in the EP regulations or as described in the Mining Sector Regulation (O. Reg. 560/94); or
- a "MISA-like" facility that discharges to a surface watercourse or private sewage treatment plant. (MOE has explained that this category is intended to capture new entrants to a MISA sector without the need to amend the regulations; it is not the ministry's intent to expand the scope of the original MISA sectors.)

Thus, the EP regime will apply to approximately 148 facilities that fall within the nine industrial MISA sectors and that discharge into a surface water body. The nine MISA sectors are: the organic chemical manufacturing sector, inorganic chemical manufacturing sector, industrial minerals sector, electric power generating sector, pulp and paper sector, petroleum sector, metal casting sector, iron and steel manufacturing sector, and the metal mining sector.

Similarly, the *EESLAA* provided that the requirement to have a SPCP only applies to "regulated persons", as defined in the EP regulations. However, the *EESLAA* also amended the *EPA* to provide MOE Directors with authority to issue an order requiring any person (not just regulated persons) to develop and implement SPCPs to prevent, decrease or eliminate discharges and spills and their adverse effects.

MOE has explained that it chose the MISA and MISA-like facilities as regulated persons because these facilities account for a significant portion of the reported spills to land and water each year. Other major dischargers, however, have not been made subject to EPs or the SPCP requirements. For example, municipal facilities were not prescribed as regulated persons, despite their significant contribution to discharges to water every year, and despite the fact that municipalities (i.e., the long-absent "M" in "MISA") were originally intended to be a key part of the MISA program when it was created in 1986. However, the possibility remains open that MOE could expand the definition of regulated persons to include municipal facilities or other industrial sectors at a future time based on their spill records.

The spill notification requirements, however, apply to all persons or facilities required to report a spill or unlawful discharge, and not just regulated persons.

EPs can only be Issued for Prescribed Contraventions relating to Water and Land:
The EP regulations set out a restrictive list of contraventions for which EPs may be issued. Generally, these are contraventions that relate to spills or unlawful discharges to water or land. These include: discharges that exceed a limit set out in a regulation, order or Certificate of Approval; failures to restore

the environment; failures to notify MOE of a spill or unlawful discharge; and failures to sample, report and keep records as required.

Although the development of the EP regime was initially prompted by the large number of industrial spills to surface water in Ontario, the list of prescribed contraventions for which EPs may be issued, as set out in the EP regulations, includes contraventions related to both water and land. An EP may not be issued for contraventions related to air discharges. However, it is possible that MOE could expand the application of EPs to air related contraventions at some future time. Unlike EPs, the SPCPs are required to address potential spills relating to all media, including air, water and land.

EPs May be Used to Address both Major and Minor Contraventions:
MOE staff have a range of abatement and enforcement tools available to them for dealing with contraventions of ministry requirements. EPs add one more abatement option. When MOE staff become aware of a potential contravention, they are required to review the ministry's newly amended Compliance Policy (F-2) to guide their response. The amended policy includes an "Informed Judgement Matrix", which directs MOE staff to look at various factors – such as the person's compliance history and the severity of any environmental or health impacts of the contravention – to determine which abatement or enforcement tool(s), such as an EP, are most appropriate to address the contravention in each particular case.

For example, for minor administrative contraventions by a person with no previous record, EPs may be considered, although the policy generally recommends that MOE staff apply voluntary abatement options such as education and outreach actions. For medium contraventions (e.g., cases where there is a minor health or medium environmental impact and/or the person has had a prior related contravention), the policy recommends mandatory abatement actions, such as an EP or control order, as well as directing the staff to consider referring the case to the ministry's Investigations and Enforcement Branch (IEB). For the more severe contraventions (e.g., cases where there are major adverse environmental or health impacts), the policy recommends mandatory abatement actions, such as EPs or other orders, as well as *requiring* the ministry staff to refer the case to IEB. This mandatory requirement to refer serious contraventions to IEB was added to the final version of the Compliance Policy in response to requests from environmental groups.

Because an EP is considered to be an administrative penalty, and not a fine or a prosecution, an EP does not preclude the ministry from both issuing an EP and referring that same contravention to IEB for investigation and possibly prosecution.

EPs offer a number of advantages over prosecutions in that they allow the ministry to respond quickly to environmental contraventions without having to engage in the time-and resource-intensive court process. As such, it is anticipated that EPs may be used to address contraventions that might previously have been prosecuted. Depending on how the new Compliance Policy is implemented, and more specifically, the extent to which MOE relies on EPs, a potential outcome of the EP regime may be a reduction in the number of cases referred to IEB and/or the number of cases prosecuted. Accordingly, the *EESLAA* requires the ministry to produce annual reports on the use of EPs, as well as undertake a five-year review, which will require MOE to examine how the use of EPs has impacted the level of prosecutions.

The Amount of the EP is Strictly Defined by the Regulations:
When the concept of EPs was introduced, there was considerable concern from some stakeholders that the EPs would be a form of a judicial penalty, and thus, the application of EPs in conjunction with prosecutions would result in cases of "double jeopardy" (i.e., cases where a defendant is tried twice for the same offence). Therefore, in developing the EP regulations, the ministry has attempted to create a rigid formula for calculating EPs, with a minimum of discretion, to ensure that the EPs are administrative penalties, and not judicial penalties.

The EP regulations and MOE's new "Guideline for Implementing Environmental Penalties" set out in detail the manner in which MOE Directors must calculate the amount of the EP. Although MOE Directors clearly need to exercise some judgement in evaluating each of the components in the EP calculation for each contravention, the calculation of the EPs is designed to be as objective as possible.

The EPs seek to Eliminate any Monetary Benefit gained through Non-compliance:
The EP regulations stipulate that an EP is comprised of two general components: a "gravity" component and a "monetary benefit component". The "monetary benefit component" (MBC) is the portion of an EP that relates to the financial benefits gained by a regulated person from not complying with legal requirements. The MBC includes both avoided costs (e.g., costs that were never incurred because the person failed to monitor as required) and delayed costs (e.g., costs that the person delayed incurring because they installed pollution control equipment two years late). By eliminating the financial benefits of non-compliance, the MBC is intended to encourage compliance.

The Director is required to calculate the amount of the MBC in accordance with the method set out in the MOE guideline entitled "Procedure for the Calculation of the Monetary Benefit Component of Environmental Penalties". This guideline is explicitly referenced in the regulation.

The Amount of the EP is a Reflection of the Severity and Impact of the Contravention:
Each EP includes a "gravity component", which relates to the "type" of contravention and the "seriousness" of its consequences. The EP regulations classify each prescribed offence as one of three "types":

- Type 1 – minor contraventions, such as failures to report or keep records;
- Type 2 – moderate contraventions, such as failures to comply with an order to prevent or eliminate an adverse effect; and
- Type 3 – major contraventions, such as spills and discharges that impair the water.

The EP regulations also set out criteria to assist the Director in determining if the impacts of the contravention on human health and the environment are "less serious", "serious" or "very serious". The EP regulations then provide a penalty range for each offence depending on the "type" and "seriousness".

The Director then evaluates a number of case specific factors set out in the EP regulations to determine a specific gravity amount within the prescribed range. In this step, the Director is required to consider the person's history of contraventions, delays in compliance, membership in the ministry's Ontario's Environmental Leaders Program, and the extent of the deviation from the contravened requirement.

In addition, for certain contraventions (i.e., spills, unlawful discharges, and failures to restore the environment following a spill), where the contravention involves a toxic substance that is listed in MOE's new "Environmental Penalties – Code of Toxic Substances", the gravity component of the EP must be increased by an additional 35 per cent. This increase is intended to reflect the fact that the consequences of an incident involving a "toxic" substance has a greater potential to adversely affect human health and the natural environment, and therefore is treated as more serious, even if the quantity of discharge was small or there was no obvious adverse effect. The Code of Toxic Substances includes 113 substances that are non gaseous, persistent, bioaccumulative and inherently toxic to humans.

Furthermore, if the contravention occurs over multiple days, the Director must multiply the gravity component by the number of days on which the contravention occurred. However, in response to numerous comments from industry groups about the potential unfairness of this multi-day adjustment in some circumstances, the ministry created two types of caps on the gravity portion of some contraventions:

- Minor (Phase II) contraventions are capped at the lesser of 180 days or $60,000 total; and
- The gravity portion of the "failure to report" contravention is capped at $100,000.

The Guideline for the Implementation of Environmental Penalties also provides MOE Directors with guidance in making their determinations in each step of the calculation.

The EP Amount may be Reduced for Responsible Actors:
The *EESLAA* established that EPs are absolute liability offences. Thus, a regulated person can be required to pay an EP even if that person exercised due diligence and took all reasonable steps to prevent the contravention. The decision to make EPs absolute liability offences resulted in a major outcry from industrial and other stakeholders. To partially compensate for the strictness of this rule, the *EESLAA* provided that regulated persons are entitled to a reduction in the amount of the EP if the regulated person:

- Took appropriate preventative steps;
- Took appropriate mitigative measures; and/or
- Had an acceptable Environmental Management System (EMS) in place at the time of the contravention.

As such, before issuing an EP, the MOE Director is required to provide a "Notice of Intention" to issue an EP to the regulated person, and to allow that person 15 days to provide support for any reductions of the EP amount pursuant to the three permitted grounds. The Director is then required to take these submissions into consideration before issuing the final EP Order.

The EP regulations set out the amount of reduction that is available for these measures. The regulations provide that the gravity component of the EP amount may be reduced by up to 30 per cent for steps taken to prevent the contravention and/or mitigate its impacts, and by five per cent if a qualified EMS (i.e., a certified ISO 14001 EMS, a verified Canadian Chemical Producers' Association Responsible Care EMS, or an equivalent EMS) was in place at the time of the contravention.

The EP Amount may also be Reduced for "Beyond Compliance Projects":
One of the objectives of the EP regime is to encourage companies to take steps for the protection of the environment beyond what is legally required. Therefore, the EP regulations provide that a regulated person may obtain a reduction in the EP amount if that person enters into a "settlement agreement" with a MOE Director, in which they agree to invest in a "Beyond Compliance Project" (BCP). A BCP is a pollution prevention or reduction project at the regulated person's facility that goes beyond what is required by law to prevent, eliminate or reduce the discharge of a contaminant into the environment.

Although the *EESLAA* provided that the EP could be reduced or cancelled pursuant to a settlement agreement (in accordance with the regulations), the ministry chose to allow only a reduction of the EP amount, and not a complete cancellation of the EP. The EP regulations stipulate that the BCP can only result in a maximum reduction of 75 per cent of the gravity component of an EP for a major (Phase I) contravention, and 100 per cent of the gravity component for a minor (Phase II) contravention. The BCP cannot be used to reduce the monetary benefit component of the EP.

Furthermore, the EP regulations provide that a company must invest three dollars towards a BCP for every one dollar reduction of its EP amount for the first 75 per cent, and five dollars for every one dollar reduction of its EP amount for the final 25 per cent (where applicable). The high costs of the BCP required to achieve a reduction in the EP may have the effect of limiting the extent to which companies actually take advantage of this option.

The *EESLAA* requires MOE to publish every settlement agreement on the Environmental Registry for public notice. MOE intends to post the final agreements as "information notices". In some situations where public consultation on the proposed settlement agreement may be appropriate and beneficial (based on the location, type of incident, type of project or level of interest), the Director may ask the regulated person to consult with the community on the proposed project. In addition, where the Director believes that broader public consultation is necessary or beneficial, the Director may post the *proposed* settlement agreement on the Registry. However, the ministry intends to post these proposed agreements as "information notices" with an invitation to comment, rather than as full proposal notices.

Special Purpose Account:
The *EESLAA* provided for the establishment of a special purpose account (SPA) in which revenue from EPs will be deposited. The EP regulations prescribe the purposes for which the SPA funds may be used, namely, for research, education and outreach activities, and community capacity-building for spill preparedness and response. Despite the fact that the *EESLAA* allowed the funds to be used for other purposes, including compensating individuals for losses or damages caused by spills, MOE has decided that the SPA funds may not be used for compensation. MOE's rationale for this decision was that Part X of the *EPA* already provides a means to seek recovery for such losses.

Implementation:
Implementation of the EP regulations will take place in two phases (see Table 1 above). The first Phase of the EP regulations and the enabling provisions in the *EPA* and the *OWRA* came into force on August 1, 2007. In Phase I, EPs may be issued for serious contraventions related to unlawful discharges (such as spills, limit exceedances, failures to report and failures to restore). On December 1, 2008, Phase II is to begin. In this phase, MOE Directors may begin to issue EPs for other less serious contraventions, such as failures to sample, report and keep records.

The amendments to the spill reporting regulation took effect August 1, 2007. The requirement to develop and implement the SPCPs will apply to all regulated persons as of September 1, 2008.

Public Participation & *EBR* Process

The ECO commends MOE on its thorough consultation process for the new regulations and guidelines. The ministry posted a proposal notice for the regulations and guidelines on the Environmental Registry for 98 days. As a result of the proposal, MOE received 55 written comments during the comment period. The ministry also undertook extensive public and stakeholder consultation sessions throughout Ontario for both the *EESLAA* and the supporting regulations and guidelines during 2005 and 2006, through which it received extensive input. The ministry also facilitated a MOE-stakeholder working group, and held a number of focussed, topic-specific sessions and individual meetings with stakeholders throughout 2006. In addition, MOE created a special EP webpage that provides basic information on the new EP regime, as well as links to each of the new regulations, guidelines and other relevant documents.

Summary of Comments:
The vast majority of the comments received were from industry groups expressing strong opposition to the regulations. The ministry also received a number of comments from environmental groups largely supporting the proposed regulations and guidelines. The main concerns raised by the commenters are summarized below.

Use of EPs:
The main overriding concern of most industrial commenters regarding both the *EESLAA* and the supporting regulations was that the EP system is patently unfair in that it provides penalties without access to the judiciary or an opportunity to provide a defence, as well as being potentially doubly punitive. One industry group stated that MOE should be tough on spills, whereas these regulations were simply tough on companies. Another industry group commented that these regulations "send out the wrong signal – a signal that business investment and growth are not welcome in the Province of Ontario."

Industrial commenters, as well as the Ontario Bar Association (OBA), expressed great concern that the potential use of both an EP and a prosecution for the same contravention places a regulated person in "double jeopardy", which is fundamentally unjust. The OBA felt strongly that a revised Compliance Policy should clearly state that both an EP and a prosecution should never be used with respect to the same incident.

The one major concern expressed by environmental groups was a fear that the use of EPs may result in a reduction in prosecutions, and thus a weakening of regulatory compliance in the province. These commenters noted that prosecutions serve as a powerful catalyst in promoting regulatory compliance. As such, they wanted to ensure that EPs are maintained in their proper place within the enforcement pyramid, and do not replace the use of prosecutions for serious environmental contraventions.

Almost all commenters – including industry groups, the OBA and environmental groups – recommended that EPs should only be used for less serious incidents; for serious incidents (e.g., contraventions such as obstruction and falsifying information, or incidents resulting in major environmental and health consequences), only a prosecution, and not an EP, should be used. In partial response to these comments, MOE modified its Compliance Policy to provide that all serious contraventions must be referred to IEB. However, the new Compliance Policy still provides that both an EP and a prosecution may be applied for the same contravention.

Definition of "Regulated Person":

Many industry commenters argued that the EP and SPCP regulations, which apply only to MISA (and MISA-like) facilities, impose an "unfair, punitive and discriminatory burden" on the MISA sectors. These commenters noted that MISA facilities were originally singled out because they were found to play a significant role in discharging toxics to Ontario's waterways; they have *not* been distinguished as a group that is a significant source of discharge to other media. Yet, the EP system includes discharges to land as well as surface water, and the SPCP requirements apply to all media (i.e., air, water and land). To rectify this inequity, a number of industrial and environmental groups suggested that the EPs and SPCP requirements should apply more broadly to all sectors.

Alternatively, many industry commenters argued that, if the definition of "regulated person" is to apply only to MISA facilities, the EP and SPCP requirements should be limited to discharges or spills to surface water only. The commenters argued that to apply EPs to other offences, such as discharges to land or other administrative contraventions, is to unfairly target MISA facilities. They also argued that this is a departure from the original intent of the EP regime, which was to address unlawful discharges to surface water.

EPs Involving Toxic Substances:

Industry commenters expressed strong concerns about MOE's proposed approach to identifying "toxic substances" and to calculating EPs involving toxic substances in the draft EP regulations. In response to these comments, MOE developed an entirely new and simpler approach to applying a "toxicity" factor to EPs. MOE also developed an entirely new list of toxic substances in a document called the Code of Toxic Substances. Although this Code is separate from the EP regulation, the document is incorporated by reference into the EP regulation.

The industry groups also argued that the approach to toxics should include an assessment of the risk, based on concentration, amount and circumstances of the discharge. These commenters argued that, without such an assessment, penalties may be disproportionately high for trivial infractions. They recommended that the list of toxics should only include a short list of substances, and that this list should include minimum toxic thresholds.

MOE chose not to include any consideration of concentration, amount or circumstances on the basis that it is often difficult to prove impairment of the ecosystem and human health resulting from the discharge of low quantities of substances, yet the cumulative effect of many discharges may cause harm to the environment and human health.

EMSs and Preventative and Mitigative Measures:

Generally all industry commenters stated that the discounts provided for preventative and mitigative measures and for qualifying EMSs are not significant enough to encourage the regulated community to implement these due diligence measures. As such, they argued that the EP system will fail to promote its stated purpose to encourage regulated persons to take steps to prevent contraventions, mitigate their effects, and prevent their recurrence. Further, the industry commenters stated that a reduction of only five per cent trivializes the importance of the EMS. The industry commenters recommended that to encourage the use of EMSs, the allowable reduction should be closer to 50 per cent for a qualified EMS.

The ministry also received numerous comments from both industry groups and other associations critiquing the onerous approach in the draft EP regulations for meeting the EMS qualifications. The ministry responded to these concerns by amending the requirements for a qualifying EMS in the final EP regulations. However, MOE maintained the original proposed discounts for the EMS and other preventative and mitigative measures.

Settlement Agreements:
Industry commenters did not support the approach for determining the reduction in the EP amount for a Beyond Compliance Project. Industry commenters suggested that the focus of the settlement agreement should be on the performance benefits that may result from the project, rather than on the costs of the project. These commenters also felt very strongly that EPs should be able to be totally expunged from a violator's record as a result of a settlement agreement.

In response, MOE revised the EP regulation to allow a reduction of the entire gravity portion of the EP amount for minor (Phase II) contraventions. However, MOE retained the limit of a 75 per cent reduction for major (Phase I) contraventions, and maintained its position that EPs cannot be cancelled outright.

Calculation of EP Amount:
Many of the industrial commenters felt that the EP regulations were too complex, requiring numerous calculations and interpretative guidelines. These commenters felt that the EP calculation should be reasonably straight forward to understand and apply. In addition, the industry commenters also felt that the method of calculation, particularly the multiple-day component, could result in extremely punitive EPs. The ministry responded to this last concern by introducing two new penalty caps for certain multi-day contraventions.

Spill Prevention and Contingency Plans:
Industry commenters were strongly opposed to the regulatory approach to the SPCPs. These commenters felt that the SPCP requirements were too complex, overly onerous, and highly prescriptive. These commenters argued that not only are the new SPCP requirements costly to implement, but also that this highly complex and prescriptive approach will impede rather than foster improved environmental compliance. Most industrial commenters expressed a preference for a simpler approach to SPCPs.

Spill Notification Requirements:
Many industry commenters similarly expressed concern that the requirements for reporting spills and discharges were far too onerous. Many argued that the cumbersome requirements to gather and submit such an extensive amount of information to the ministry following a spill could actually hinder a regulated person's ability to quickly and effectively respond to a spill emergency. Some industry commenters also argued that the significant amount of time required to assemble the data and prepare a comprehensive report will likely cause a delay in reporting, and thus delay the Spill Action Center's ability to coordinate an environmental response. These commenters recommended that first contact reporting should be swift and focused on the need for any immediate response; additional information could be provided later.

Implementation Timeline:
Many of the industrial commenters felt that the proposed implementation timeline for both the EP and SPCP regulations was unreasonably short, and would not allow the regulated community sufficient time to become educated about and prepare for the new system. In response, MOE extended some (but not all) of the implementation timelines by a few months.

Quality of Registry Notice:
Although both the proposal notice and the decision notice that MOE posted on the Registry were clear and thorough, the sheer volume of regulations and policies contained in the single Registry notice made it more difficult for the public to review and comment. The ECO notes that it would have been helpful if MOE had posted separate proposal notices for some of the regulations and guidelines, with cross-references and links to the other related notices. For example, MOE could have posted one notice for the EP regulations and guidelines, one for the spills regulations and guidelines, and another for the new Compliance Policy, rather than packaging all of these important proposals into a single Registry notice.

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MOE provided a brief statement indicating that these regulations contribute to MOE's commitment to protect the environment. The ministry noted that the EPs are a new tool that encourages environmental compliance and enables MOE to respond quickly to environmental non-compliance. These regulations also encourage regulated persons to take preventative and mitigative actions, and to respond quickly to spills and other incidents that could result in environmental impairment.

Other Information

To support the implementation of the EP regulations, MOE amended each of the nine MISA regulations to explicitly require sampling and analyses to comply with MOE's MISA sampling protocol (last updated in 1999).

In 2000, MOE had proposed an earlier financial penalty regime, called Administrative Monetary Penalties; however that regime was never implemented.

ECO Comment

As noted in the ECO's review of the *EESLAA* in the 2005-2006 Annual Report (pages 102-107), the ECO strongly supports the development of EPs. The threat of a penalty for spills or unlawful discharges should persuade companies in Ontario to re-examine their processes and to implement pollution prevention measures, and ultimately, help reduce the occurrence of spills and discharges in the province. Further, when spills, unlawful discharges and other related contraventions do occur, the EP regime provides MOE with an important new tool to promptly and efficiently address those contraventions.

As noted in the ECO's 1999-2000 and 2005-2006 Annual Reports, EPs provide a number of advantages over prosecution. As MOE staff struggle with a lack of capacity to adequately enforce all of its laws (see the ECO's 2007 Special Report on capacity: Doing Less with Less), EPs should provide ministry staff with a faster, less resource intensive, and less costly means of bringing contraveners into compliance with provincial environmental laws.

However, the ECO believes that, although EPs are an important abatement tool, EPs must not displace the role of prosecutions, which are a key enforcement tool in the ministry's overall compliance strategy. Studies have demonstrated that an emphasis on enforcement correlates with increased regulatory compliance. These studies have also demonstrated that companies that have been prosecuted tend to allocate significantly more of their resources towards environmental protection than those that have not been prosecuted. Accordingly, the ECO commends MOE for making the important change to the final Compliance Policy in response to comments made by environmental groups, by *requiring* that all serious contraventions be referred to IEB, rather than merely considering such referrals, as recommended in the draft version of the policy.

Regardless, it is not yet known how the use of EPs will impact the decisions of IEB staff to investigate and prosecute contraventions where EPs have already been issued. MOE is required to conduct a five-year review of the EP program and its effect on prosecutions. The ECO looks forward to reviewing MOE's report on the use of EPs and their effect on MOE's overall compliance strategy. The ECO also encourages MOE to monitor the effectiveness of the EPs, and based on this data, to assess whether the EP regulations should be extended more broadly to other sectors (such as municipalities), and possibly to other media as well.

Although the ECO acknowledges that the new EP regime is indeed complex, the ECO believes that the new EP regulations provide an effective regulatory framework that is both objective and transparent. The EP regulations provide detailed calculations that minimize discretion and ensure that penalties are fair and predictable. The ECO believes that MOE has provided a balanced approach to the calculation of deductions for Beyond Compliance Projects, EMSs, and other preventative and mitigative measures.

These deductions will hopefully encourage regulated persons to take appropriate steps, while ensuring that penalties continue to be substantial enough to act as a deterrent.

As noted above, the *EESLAA* requires MOE to publish every settlement agreement on the Registry. MOE intends to post all of the final agreements as information notices. These postings will provide notice and transparency; however, they will not provide an opportunity for comment. Where the Director wishes to consult with the public, the ministry intends to post these information notices at the proposal stage, with an invitation to comment. As discussed in several past ECO Annual Reports, soliciting comments through information notices may confuse the public, as there is no legal requirement for the ministry to consider public comments or to post a final decision notice explaining how comments were considered. As such, the ECO urges MOE to post those agreements as full proposal notices, rather than as information notices. The ECO will also be monitoring how the Directors use their discretion to provide opportunities for comment.

Lastly, the ECO welcomes the new SPCP regulation and the amendments to the spill reporting requirements. The new spill reporting amendments provide detailed and thorough spill notification requirements. A concern expressed by numerous industries, however, is that meeting MOE's extensive information reporting requirements during a spill emergency may hinder a facility's ability to undertake immediate and necessary mitigative actions. The ECO encourages MOE to monitor the impact of the new spill reporting regulation to ensure that the new requirements do not hinder spill response efforts.

Review of Posted Decision:

4.6 The Waste Management Projects Regulation under the *EAA*

Decision Information:

Registry Number: RA06E0018	Comment Period: 90 days
Proposal Posted: December 7, 2006	Number of Comments: 26
Decision Posted: March 23, 2007	Comes into Force: March 23, 2007

Description

In March 2007, the Ministry of the Environment (MOE) filed a new regulation – the Waste Management Projects Regulation (O. Reg. 101/07) under the *Environmental Assessment Act* (*EAA*). The ministry also introduced an accompanying guide entitled the "Guide to Environmental Assessment Requirements for Waste Management Projects," which is incorporated by reference into the regulation. The Waste Management Projects Regulation and the associated guide establish a simplified assessment process for certain types of waste disposal sites in Ontario.

Background:

In response to numerous stakeholder concerns over the years regarding a range of problems with Ontario's environmental assessment (EA) process, in June 2004, MOE appointed an advisory panel of expert practitioners, as well as three sector committees (waste, transportation/transit and energy) to make recommendations for ways to improve the EA process. (For additional background context, see the section entitled "EA – Vision Lost" in Part 2 of the Annual Report.)

In March 2005, the EA advisory panel submitted recommendations to MOE for improvements for both the EA process generally and as it applies specifically to projects in the waste, transportation/transit and energy sectors. The ministry subsequently carried out public consultation on these recommendations. In June 2006, based on both the advisory panel's recommendations and the subsequent public consultation, MOE announced an action plan to implement EA improvements. One of the components of the ministry's action plan was to create a regulation (with an incorporated guide) under the *EAA*, which would provide a special, simpler EA process for certain waste disposal sites in Ontario.

A Three-Tiered Assessment Framework:
The Waste Management Projects Regulation establishes a new three-tiered assessment framework for the waste management sector. Under this new tiered system, the level of review required for each waste disposal project is intended to be commensurate with the type, size and environmental impacts (both positive and negative) of the project. The regulation accordingly assigns each type of waste disposal activity to one of the following three process streams:

1. Projects designated under Part II of the *EAA* (i.e., projects required to conduct a full EA);
2. Projects designated under the *EAA*, but then exempted from the full EA requirements on the condition that the proponent conducts an Environmental Screening Process; and
3. Projects not subject to the *EAA*.

Individual EAs:
The regulation designates certain types of waste disposal projects as being subject to the full "individual EA" requirements set out under Part II of the *EAA*. This a more onerous assessment process, which includes requirements for the preparation of a Terms of Reference (ToR) and an individual EA, as well as ministry review and approval of both the ToR and the EA before the project may proceed. Accordingly, this requirement is reserved for those waste disposal activities that MOE deems to have the potential for significant environmental impacts. This includes large-scale projects, such as large landfill sites and most incinerators that do not produce excess energy (see Table 1).

The Environmental Screening Process:
The Waste Management Projects Regulation, through the incorporated guide, establishes a new process called the Environmental Screening Process for Waste Management Projects (the "Screening Process"). This process, which is similar to the screening process that was established in 2001 for the electricity sector, is a simplified, proponent-driven, self-assessment process.

The Screening Process is much less time and resource intensive than a full EA, and it has no requirements for approvals from MOE. The Screening Process requires proponents to: provide public notice of the Screening Process; prepare a project description; screen for potentially negative environmental effects; describe the potential environmental issues to be addressed; conduct an initial phase of public consultation; conduct studies and assessments of any potential environmental effects of the project; develop mitigation measures; conduct a second phase of public consultation; conduct additional studies, assessments and public consultation if required; and publish an Environmental Screening Report.

The guide states that the proponents may, at their own discretion, determine the appropriate method of consultation during the Screening Process. The guide also explains that, although proponents are required to consult with the affected government agencies (including MOE) during the Screening Process, the government is not required to provide comments or advice to the proponents, although MOE *may* provide comments and advice to the proponent if it wishes to do so. The guide further states that proponents are "strongly encouraged" to circulate a draft copy of the Screening Report to MOE and other affected agencies, although this too is not required. There is also no requirement for the ministry to review or approve the Screening Report (unless there is an elevation request, as discussed below).

Upon completion of the Screening Report, the proponent is required to publish a Notice of Completion. The public then has 60 days to review the report, during which time anyone may submit a request to the MOE Director to have the project elevated to an individual EA. If an elevation request is made, MOE is then required to review the Screening Report. The Director may then decide to deny the elevation request, deny the elevation request with conditions, or, where the Director determines that the project is likely to have significant negative environmental effects or otherwise requires further review, grant the elevation request.

If the proponent subsequently wishes to make modifications to its waste management project after the completion of the Screening Report, or if the proponent waits more than five years to start construction of the project, the proponent is required to determine if an "Addendum Process" is required to reassess any aspect of the project considered in the original Screening Process. The guide does not, however, identify any means by which the public may challenge a proponent's decision that the Addendum Process is not required.

The Waste Management Projects Regulation designates a number of waste disposal projects that are deemed by MOE to have "predictable environmental impacts that can be readily mitigated," as subject to the *EAA*, but then exempts those activities from the EA requirements on the condition that the proponents fulfill the requirements of the Screening Process. The types of waste disposal projects specified in the category include: most Energy from Waste (EFW) facilities, small incinerators that do not produce energy, mid-sized landfills, and large waste processing sites, such as transfer stations and composting facilities (see Table 1).

Projects Not Subject to the EAA:

The regulation also expressly sets out those waste disposal activities that are not subject to the *EAA*. The types of waste disposal facilities included in this category are those projects that MOE considers to have minimal environmental effects. This includes: small landfills, certain waste recycling and transfer stations, and short-term pilot projects (see Table 1). These projects are still required, however, to obtain all approvals, such as Certificates of Approval (Cs of A) for waste disposal sites or air emissions, otherwise required under other Acts, such as the *Environmental Protection Act* (*EPA*). In addition, the guide also confirms that all approvals relating to these projects that are subject to the *Environmental Bill of Rights* (*EBR*) will continue to be subject to the requirements of the *EBR*.

Table 1: Assessment Processes for Select Waste Disposal Activities(1)

Type of Waste Disposal Site	**Not Subject to *EAA***	**Environmental Screening Process**	**Individual EA**
Landfills	Small landfills < 40,000 m^3	Mid-size landfills between 40,000 m^3 and 100,000 m^3	Large landfills > 100,000 m^3
Energy From Waste (EFW) Facilities(2)	Pilot projects that will operate < 12 months Smaller EFWs (which receive < 100 tonnes of waste per day) established at a commercial/industrial facility for the primary purpose of producing energy for the facility (not managing waste).	EFW facilities that do not use coal, oil or petroleum coke as fuel. Larger EFWs (which receive > 100 tonnes of waste per day) established at a commercial/industrial facility for the primary purpose of producing energy for the facility (not managing waste).	All other EFW facilities that use coal, oil or petroleum coke as fuel.

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(1) The Table is abbreviated for length considerations. Please refer to the Waste Management Projects Regulation and the accompanying guide for the complete list of project designations.

(2) EFW Facilities are sites that use thermal treatment processes (such as incineration, gasification, pyrolysis or plasma arc treatment) that generate excess energy.

Non-EFW Thermal Treatment Facilities[3]	Pilot projects that will operate < 12 months Smaller Non-EFW (which receives < 100 tonnes of waste per day) established at a commercial/industrial facility that only treats waste generated by the facility.	Small Non-EFW facilities that treat < 10 tonnes of waste per day, *and* do not use coal, oil or petroleum coke as fuel.	All other Non-EFW facilities that use coal, oil or petroleum coke as fuel. All other Non-EFW facilities that treat > 10 tonnes of waste per day.
Waste disposal sites	Transfer/processing sites that transfer < 1,000 tonnes of waste per day. Waste disposal sites that only handle, store, transfer, process or dispose of "exempt" waste (as defined by Regulation 347 under the *EPA*)	Transfer/processing sites that process waste *and* transfer > 1,000 tonnes of waste per day.	All waste disposal sites that finally dispose of hazardous or liquid industrial waste.

Implications of the Decision

EA Requirements now Apply Consistently to Both Public and Private Activities:
As a rule, the *EAA* only applies to waste projects by public sector proponents (i.e., municipalities or other public bodies), although the minister can (and typically does) designate most significant private sector waste management projects (such as mid-size and large landfills) as subject to the requirements of Part II of the *EAA*. The Waste Management Projects Regulation now applies the EA requirements equally to both public and private sector waste management projects, by prescribing types of waste disposal projects, rather than types of proponents. This change should provide a more standardized approach to waste management projects, and should also capture some additional privately-owned waste projects in the EA process that previously may not have been subject to the Act.

The EA Designation of Many Projects has Changed:
The EA designation of many waste management projects has changed. Some projects – such as waste processing/transfer sites that transfer more than 1,000 tonnes of waste per day, or some municipal landfills that cost less than $3.5 million to establish – which were previously not subject to any EA process at all, are now required to conduct a Screening Process.

Conversely, many more projects that were previously subject to the full EA requirements under the *EAA*, and thus deemed to be "major projects with the potential for significant environmental effects," are now subject to the simpler Screening Process, which is intended to be applied only to projects that have "predictable environmental effects that can be readily mitigated." For example, mid-size municipal landfills (i.e., landfills between 40,000 and 100,000 cubic meters), and EFW facilities that burn over 100 tonnes of waste per day and that do not use coal, oil or petroleum coke as fuel, were previously required to conduct a full EA, but are now able to conduct the Screening Process instead.

However, MOE has not – in the guide or otherwise – provided information to support its decisions to change the EA treatment for many projects, nor has the ministry demonstrated that each of the project types meet the criteria for the process stream to which they are assigned.

The absence of a science-based rationale for the ministry's decisions to assign the various waste management projects to the different EA process streams creates uncertainty as to whether all projects

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(3) Non-EFW Facilities are sites that use thermal treatment processes (such as incineration, gasification, pyrolysis or plasma arc treatment) to dispose of waste, which do not generate excess energy (i.e., all energy generated is used to dispose of the waste).

are appropriately classified. For example, the Waste Management Projects Regulation assigns most EFWs to the Screening Process, even though EFWs tend to use newer and less "tried and tested" technologies, with less predictable environmental effects. MOE has not demonstrated that EFWs have "predictable environmental effects that can be readily mitigated," but rather has merely stated that these facilities provide an environmental benefit by generating energy as the rationale for including them in the Screening Process. Whether EFWs have "predictable environmental impacts that are readily mitigated" remains a contentious point with the public, as comments in the Registry proposal made clear (see below).

Similarly, the regulation assigns mid-size landfills to the Screening Process (and carries forward the longstanding EA exemption for small landfills), but again, MOE has not demonstrated that smaller landfills have fewer or more predictable environmental effects than larger landfills. MOE has only stated that the application of the Screening Process for mid-size landfills "recognizes the need for smaller municipalities in the province to manage their waste systems efficiently."

Some Projects have been Prioritized without the Benefit of a Guiding Provincial Policy:
It appears that the province has made some policy decisions to favour certain types of waste management projects (such as EFW facilities) by including them in the streamlined Screening Process. However, these individual policy decisions were not made within the proper context of a broad provincial waste management policy.

The EA Advisory Panel discussed the need in 2005 for the province to develop a provincial policy on waste management to provide context for the EA process. In the ECO's 2005-2006 Annual Report, the ECO similarly recommended that MOE develop a provincial waste management strategy that addresses waste diversion and waste disposal. MOE has itself recognized the need for a provincial waste strategy and has stated that it is developing a "Statement of Provincial Priority" that will articulate the province's priorities for the waste sector and help to identify the "need" for waste disposal projects in the EA process. In June 2007, MOE posted a proposal on the Environmental Registry seeking input on a "best practices" plan for waste managers in the province, which included some provincial policy on waste. However, this proposal was developed after the regulation was finalized, and more importantly, it only addresses a small portion of the waste issues that need to be addressed in a comprehensive provincial waste policy.

Screening Process should Provide a Faster, Easier and less Expensive Assessment Process:
The new Screening Process is intended to provide a more streamlined process for those waste management projects that are subject to this process stream. MOE has stated that the Screening Process should provide a more consistent, predictable and timely process, which can deliver a faster "yes" or a faster "no", while still protecting the environment.

Accordingly, the Screening Process should help to address some of the main criticisms of the EA process as they relate to waste disposal sites – i.e., that it is time consuming, costly, unpredictable and hard to navigate. The Screening Process should reduce the timelines and expense for proponents, and thus facilitate the development or expansion of waste disposal sites in the province.

Screening Process Removes many of the Key Elements of the EA Process:
MOE states that the Screening Process maintains the purpose of the *EAA* and provides the same level of protection to the environment as the full EA process. However, the Screening Process removes some of the essential components of the EA process. Most notably, the Screening Process does not require proponents to consider either the "need" for the project or potential "alternatives" (including alternatives to the project type, alternative technologies or alternative locations) – which were once considered fundamental components of the EA process.

The lack of a requirement to consider the "need" and "alternatives" may have significant implications, particularly given that the province has not yet developed a comprehensive provincial waste management policy to help assess the real need for waste disposal capacity in the province, or to assess the best methods of meeting that capacity. In addition, the lack of a requirement to examine alternative locations, particularly for landfill projects, which tend to be very environmentally site sensitive, may also have significant implications for the environment.

The Screening Process also removes any requirements for government approval (other than verifying that all of the formal requirements of the Screening Process have been met). With no requirement to consider the "need" or "alternatives", and no requirement for formal approval, it seems likely that the vast majority of projects subject to the Screening Process will proceed. The Screening Process will likely only be used to determine the details of how the projects should proceed, not *if* they should proceed. In support of this presumption, the accompanying guide encourages proponents to conduct the Screening Process in parallel with other legislative requirements, such as seeking other approvals for the project.

Screening Process Shifts Onus from the Ministry to the Public:
The Screening Process provides a relatively "hands-off" approach for MOE's oversight of the Screening Process and its implementation. The ministry is not required to provide comments or advice to the proponents during the Screening Process; it is not required to review the Screening Report (unless an elevation request is made); and it is not required to monitor proponents' compliance with their Screening Reports. Although the draft version of the guide stated that the ministry would monitor for compliance with commitments made by proponents in the Screening Reports (such as commitments to mitigate environmental effects), this statement was noticeably absent from the final version of the guide. Ministry staff has indicated that they do not have the resources to conduct this type of monitoring. In addition, the ministry is not required to conduct any periodic evaluation of the Screening Process to assess how well this process is meeting its goals.

Conversely, the Screening Process places a considerable burden on the public to review the sufficiency of the Screening Reports and make elevation requests, which must include (among other things) a description of the specific environmental concerns that remain unresolved.

Other Consultation under the EBR and EPA:
Generally, most applications by proponents for certain approvals (such as Cs of A for air emissions or waste management systems under the *EPA*) are subject to public participation requirements under the *Environmental Bill of Rights* (*EBR*). The *EBR* requires the ministry to post the proposals on the Environmental Registry for comment and to consider all comments received, and provides an opportunity for third party appeals of the ministry's decision.

However section 32 of the *EBR* provides an exemption from these requirements where the approval being sought is a step toward implementing a project that has been approved or exempted under the *EAA*. Since projects that are reviewed under the Screening Process will be proceeding in accordance with an *EAA* designation and exemption, the approvals related to these projects are exempt from all of the *EBR* public consultation requirements.

Similarly, the *EAA* designation and exemption of the projects under the Screening Process also provides those projects with an exemption from the public hearing requirements under the *EPA*, which would otherwise require or permit (depending on the circumstances) a public hearing when the applicant applies for a C of A for a waste disposal site.

The combined effect of these provisions is that waste management projects can potentially be approved without any public hearing under either the *EPA* or the *EAA*, and without any public participation rights under the *EBR*. Given this potential outcome, the EA Advisory Panel recommended in its 2005 report that the province revise both of the public consultation exemptions in the *EPA* and *EBR* to ensure that the public's rights to participate are not unduly restricted.

Public Participation & *EBR* Process

In December 2006, MOE posted the draft Waste Management Projects Regulation and the accompanying draft guide on the Environmental Registry for public consultation, with a 90-day comment period. During the comment period, the ministry also conducted focused consultation sessions with stakeholder groups representing environmental groups, ministries, the municipal sector, and private sector waste management industries. As a result of the public consultation on the proposal, the ministry received a total of 26 comments. The key comments are summarized below.

EA Reforms are Needed to Encourage Development of Waste Disposal Capacity:
A number of commenters – including waste and other industry associations and some municipalities – supported the reforms, stating that the regulation and guide provide greater predictability and timeliness, which is needed to encourage investment in the waste management industry.

A Simplified EA Process for Waste Management is not Required:
Many other commenters, on the other hand – including numerous environmental groups and several municipalities – were strongly opposed to the regulation. Several of these commenters stated that the premise for these EA reforms (i.e., that there is a need to provide a faster and simpler EA process to facilitate development of waste disposal sites) is misguided. They argued that the assertion that the current EA process is impeding the development of sufficient waste disposal capacity in Ontario is unfounded. These commenters argued that the real problem that needs to be addressed is the issue of reducing waste generation, increasing waste diversion, and ultimately decreasing the volume of waste disposal capacity needed for residuals.

Need for a Provincial Waste Management Strategy:
A number of commenters from all sectors suggested that, before the government implement any EA reforms for the waste sector, the government needs to first develop a comprehensive waste management strategy for Ontario, as recommended by the EA Advisory Panel. These commenters suggested that MOE create a waste management policy framework, through public consultation, which clearly articulates:

- real diversion goals and timelines;
- the volume of disposal capacity in the province – both existing and required;
- the province's preferred means for provision of waste disposal capacity (including evaluation and preferences for different technologies and types of facilities); and
- standards to guide the siting of waste management projects.

With such policies in place, the commenters suggested that MOE could then properly streamline the EA process (such as eliminate the "need" and "alternatives" component of the EA process), as well as justify the preferential treatment for certain waste disposal options based on the policy. Without such an overarching provincial policy, however, these groups argued that the new regulation inappropriately and prematurely implements individual policy decisions, such as favouring EFWs.

Inappropriate Treatment of EFW Facilities:
The vast majority of commenters from all sectors were opposed to the inclusion of EFW waste disposal technologies in the Screening Process. These commenters stated that EFWs, like other forms of thermal degradation, create significant emissions (such as dioxins and furans) posing health and environmental risks, and contribute to climate change. They also noted that many of the EFW technologies that are included in the definition of thermal degradation in the regulation are still relatively new and unproven with unpredictable impacts. For these reasons, the commenters argued that EFWs do not warrant a decreased level of assessment; rather, EFWs require the more rigorous level of review provided in the individual EA process, to both evaluate the new technologies and force a consideration of other alternatives.

Many of the commenters also argued that MOE did not provide a valid justification for providing preferential treatment for EFWs, other than to state that EFWs provide the "benefits of energy generation." Several groups commented that EFWs are generally inefficient producers of energy, and regardless, the claimed energy benefits of EFWs do not serve as proper justification for promoting EFWs over other options that pose virtually identical environmental risks, impacts and concerns.

Treatment of Small and Medium Landfills:
A number of commenters disagreed with the treatment of landfills in the regulation. Several environmental groups argued that all landfills, large or small, are environmentally significant and should be subject to the individual EA requirements. These commenters questioned the assumption that small landfills are environmentally preferable to large landfills. To the contrary, they argued that smaller landfills tend to have less sophisticated design features to prevent adverse environmental impacts, and furthermore, a proliferation of smaller landfills scattered throughout the province could have a greater impact on more air and watersheds across Ontario.

Other commenters suggested that assignment of landfills to the various EA process streams based on the size of the landfills is generally inappropriate. Many of these commenters argued that the thresholds are arbitrary, and that the assignment of waste disposal sites to an EA process should be based on other more relevant factors than size. Many of these commenters noted that the environmental effects of a landfill, which are very site sensitive, can depend more on the siting of the facility than its scale. Other commenters suggested that the EA process stream should be based on the kind of waste that is accepted by the facility (such as sites that only accept residual waste that have met Ontario's 60 per cent waste diversion goal, or sites that only receive a single type of waste, should receive preferential EA treatment).

A few commenters felt that the EA requirements for landfills should generally be lower. One waste industry association suggested that larger expansions of landfills should be allowed without triggering EA requirements, to help facilitate the development of needed waste disposal capacity in Ontario. In addition, a few industry commenters argued that if EFW facilities are given preferential treatment because of the environmental benefit of producing energy, then large landfills that generate energy through gas recovery should similarly be included in the Screening Process rather than the individual EA process.

Inadequate Screening Process:
A number of environmental groups expressed concern regarding the minimal level of review required by the Screening Process. These groups observed that the Screening Process does not require any consideration of "need" or "alternatives", which ought to be considered as a reasonable substitute for the individual EA process. One municipality also commented that the new Screening Process supports an approach to resolving environmental concerns through "project engineering solutions and on-site mitigation, rather than a precautionary approach of planned avoidance through selection of technologies and optimal siting, with mitigation as a last resort."

Similarly, several environmental groups submitted a comment stating that the Screening Process appears to be "a glorified version of Part V of the *EPA*, which is largely an exercise in site-specific impact mitigation rather than comprehensive environmental planning aimed at achieving sustainability." They further added that the Screening Process does not appear to add any value or benefits on top of the substantially similar C of A process for waste management systems under the *EPA*.

Additionally, these environmental commenters also argued that the Screening Process is overly permissive, rather than mandatory or prescriptive, and thus provides proponents too much latitude in deciding how to carry out the Screening Process. These commenters concluded that, given the inadequacies of the Screening Process, this process should only be used by environmentally benign projects, such as small-scale, appropriately-sited facilities that are consistent with provincial waste policy, and which have relatively minor environmental impacts that are readily mitigable.

Elevation Requests:
A number of commenters from all stakeholder groups expressed concern about the ability of the MOE Directors to objectively decide whether to grant or deny elevation requests for projects that undergo the Screening Process. These commenters stated that the Director, who must play a dual role as both advisor to the proponents and decision-maker on EA disputes, is not sufficiently impartial for the purposes of deciding such requests. Several of these commenters also stated that the past experience in Ontario, based on the similar Screening Process for the electricity sector and the various Class EAs, has clearly demonstrated that elevation requests are very rarely granted, even for significant or controversial undertakings, and that elevation decisions often appear to be political rather than based on merit.

Accordingly, many of these commenters recommended that the government amend the process for elevation requests, as recommended by the EA Advisory Panel, to establish a formal adjudicative process administered by the Environmental Review Tribunal (or some other independent body), to decide elevation requests in a manner that is more transparent, credible and faster.

Consultation under the EPA and the EBR:
Several environmental groups argued that the government should both repeal the exemption from the hearing requirements under the *EPA* where the project is designated and/or exempted under the *EAA*, and amend the "EA exception" to the public participation requirements currently entrenched in the *EBR*.

One municipal commenter expressed concern that without public participation or hearing rights under the *EPA* or *EBR*, proponents might leave all of the important technical details of the project to the C of A application stage, where there is no longer an opportunity for public input or review.

Changes Made in Response to Comments:
While the broad principles and policy decision set out in the proposal remained unchanged, MOE did make a number of amendments to the draft regulation and guideline in response to comments received during the Registry and other stakeholder consultations, including the following changes:

- In response to the numerous comments questioning the treatment of "changes" to waste disposal sites in the regulation, MOE added a definition for change to a waste disposal site in the final regulation.
- In response to stakeholder requests, MOE also amended the regulation to provide that the Screening Process would apply to the excavation of waste from a landfill, where the excavation would increase the capacity by 40,000 -100,000 cubic meters, without increasing the size of the landfill.
- MOE amended the regulation to provide different EA processes for thermal treatment facilities based on their use of coal, oil or petroleum coke as part or all of their fuel.
- MOE amended the regulation to provide that all hazardous and liquid industrial waste disposal sites are subject to the individual EA process, regardless of where the waste originates. The draft regulation captured only those hazardous and liquid industrial waste disposal sites where the waste was generated at a location other than where the waste disposal site.
- In response to comments that the regulation was unclear, MOE amended the regulation to more clearly state which EA requirements or exemptions apply to which waste disposal sites.
- Various amendments were made to the guide to correspond to amendments that were made to the regulation, and to generally make the guide more user-friendly.
- MOE also made some minor amendments to the consultation requirements in the guide in response to stakeholder comments.

SEV

MOE provided an extremely brief Statement of Environmental Values (SEV), stating that it considered "the interrelations among the environment, the economy, and society." The ministry also stated that the regulation and guide "will place first priority on preventing and second priority on minimizing the creation of pollutants that can damage the environment." However, it is unclear to the ECO how the new changes to the EA process will prevent and minimize pollutants as suggested by MOE.

Other Information

Ancillary amendments to Regulation 334, R.R.O. 1990, under the *EAA* were made to conform to the Waste Management Projects Regulation.

Complementary amendments to O. Reg. 206/97 under the *EPA* extend the exemption from mandatory hearings provided in the *EPA* to the waste disposal sites that are designated and exempted from the *EAA* by the Waste Management Project Regulation.

On the same date that this regulation was filed, the government also filed regulatory amendments to Regulation 347, R.R.O. 1990 (General – Waste Management) under the *EPA*, which provide further streamlining of approval requirements under the *EPA* for certain waste projects. See section 4.4 of this Supplement for a full review of these amendments to Regulation 347.

ECO Comment

While the ECO recognizes the clear need for EA reform, particularly with respect to the waste sector, it appears to the ECO that the Waste Management Projects Regulations is putting the cart before the horse.

The Waste Management Projects Regulation implements several provincial policy decisions to favour certain types of waste management projects (such as EFW facilities) by including them in the simplified Screening Process. In addition, the new Screening Process removes key requirements from the EA process, such as eliminating the requirement for proponents to consider both the "need" for the project and the potential "alternatives" for the project (including alternatives to the project type, alternative technologies and alternate locations).

Yet, these important changes to the EA process were made by the government without the benefit of an open and transparent provincial waste management strategy to provide the context and support for the development of the streamlined process. Despite the fact that both the EA Advisory Panel and the ECO recommended in 2005 and 2006 (respectively) that the province develop a provincial waste policy, the province still has not developed an adequate provincial waste management strategy in consultation with the public. While the ECO recognizes that MOE has taken some recent steps to propose a policy statement on waste management, the ECO believes that a comprehensive provincial waste management policy – which includes an assessment of the actual need for waste disposal capacity in the province (considering plans for waste diversion), a provincial strategy for achieving provincial waste goals, and an evaluation of the different methods of achieving the required capacity – is necessary. The ECO will continue to monitor MOE's progress in developing a comprehensive provincial waste management policy that is subject to an open and transparent public dialogue.

Without an overarching provincial policy on waste management that has been subject to public consultation, it seems premature for the government to be promoting certain types of waste management facilities, and for the government to be eliminating the assessment of need and alternatives in the Screening Process. Indeed, many commenters noted that the policy decisions implemented in the Waste Management Projects Regulation – such as the preference for EFWs and smaller landfills over other incinerators and larger landfills – remain unsupported by transparent and credible policy rationales, and in some case, appear to be contrary to public opinion.

The ECO is concerned that the new Screening Process for the waste sector is being used as a proxy for the full EA process, even though the Screening Process retains only a few vestiges of the spirit and intent of the *EAA*. With no requirements to consider "need" or "alternatives" and minimal government involvement in the process (such as no requirements for monitoring or approval), as well as a recommendation in the guide that proponents should seek other project approvals while conducting the Screening Process, the Screening Process appears to reinforce the idea that a "yes" is predetermined for projects under the *EAA*. The Screening Process appears to be just another means of planning out the details of the proposed project – much like the other approval processes already established under other Acts – rather than a comprehensive assessment of *if* (and how) a project should proceed, as intended by the *EAA*.

Finally, the ECO is concerned about the potential use of the public participation exemptions under both the *EBR* and *EPA* for those projects that are "designated" and then "exempted" pursuant to the Screening Process. Given that the projects under the Screening Process are only subject to minimal consultation requirements, the combined effect of the *EPA* and *EBR* public participation exemptions is that waste management projects can be approved without any public hearing or other public participation rights under the *EBR*. As noted in the past, the ECO does not believe that this was the original intent of section 32 of the *EBR*.

Review of Posted Decision:

4.7 A Ban in Southern Ontario on Burning Used Oil in Space Heaters

Decision Information:
Registry Number: RA07E0001
Proposal Posted: January 11, 2007
Decision Posted: June 29, 2007
Comment Period: 51 days
Number of Comments: 560
Came into Force: June 27, 2007

Description

On June 27, 2007, the Ministry of the Environment (MOE) filed a regulation to ban the burning of used oil in space heaters in southern Ontario. This amendment to R.R.O. 1990, Regulation 347 ("Reg. 347") – General - Waste Management – under the *Environmental Protection Act* (*EPA*) applies only to combustion units (e.g., space heaters, furnaces and boilers) that are used to heat enclosed areas for the comfort of humans or to provide a suitable temperature for materials, including plants and animals. Many of the affected facilities are auto repair shops and auto and truck dealers that burn oil obtained from vehicular oil changes as an inexpensive and convenient means to heat their facilities and to manage this waste. These combustion units (often referred to as space heaters) are also used by other types of facilities, including greenhouses.

Prior to this amendment, almost 700 facilities had obtained Certificates of Approval (Cs of A) for Air to burn in total about 10 million litres of used vehicle oil annually. About 500 of these facilities are located in highly urbanized southern Ontario and burn about seven million litres of used oil annually. The ban, effective June 1, 2009, applies to facilities with Cs of A (Air) granted before January 11, 2007, located in southern Ontario, as well as older facilities that were exempt from the requirement to obtain a C of A because their space heaters were in operation prior to September 1992 and had never been altered or replaced. Facilities burning used oil in space heaters without approval became subject to the ban on June 27, 2007.

The ban does not apply to agricultural operations that burn only their own used oil or to industrial operations that burn used oil under a C of A (Air), such as a cement kiln, blast furnace or industrial boiler. The ban also does not apply in northern Ontario – Territorial District of Algoma, Cochrane, Kenora, Manitoulin, Nipissing, Parry Sound, Rainy River, Sudbury, Thunder Bay and Timiskaming – since used oil collection services are limited in this area according to MOE.

MOE explained that the ban applies to space heaters because they operate without emission controls and at temperatures that are too low to combust contaminants in the used oil. Unlike home heating oil, motor oil is not optimized for heating, and may include substances that were added to optimize its lubricating qualities or produced during engine operation. Before used oil is burned, other substances may have been added either accidently or deliberately, such as antifreeze. MOE noted that burning used oil releases contaminants, such as arsenic, lead, sulphur, polycyclic aromatic hydrocarbons (PAHs), and particulates to the air in amounts greater than from conventional fuel. The ban was established to "protect health, improve air quality, encourage recycling" and "encourage economic development in the environmental sector." MOE advised that:

- One space heater burning used oil can emit 10,000 times more lead than a home burning clean fuel and produce 40 tonnes of greenhouse gases annually.

- Sulphur dioxide emissions will be reduced by a factor of 200 and particulate matter by a factor of 35 in comparison to home heating oil.
- An additional seven million litres of used oil (equivalent to 2.5 million vehicular oil changes) will be available for re-refining.

MOE also noted that facilities using space heaters next to residential areas may be affecting local air quality and the health of neighbours.

Since there was confusion about whether or not used lubricating oil that is processed or used as fuel should be managed as a waste under the *EPA*, MOE added used lubricating oil to the list of designated wastes subject to the waste management provisions in Reg. 347. MOE explained that this amendment clarifies existing policy.

Background:
The estimated 10 million litres of used oil burned in space heaters is only a small percentage of the approximately 215 million litres generated annually in Ontario. Approximately 75 million litres is collected to be re-refined by Safety-Kleen in Breslau, Ontario. Re-refining is a process that produces high quality oil products that can be repeatedly re-used and that can be produced using about one-third of the energy required than if these products were made from crude oil. Some used oil is burned in Ontario cement kilns that have pollution controls and another 75 million litres is exported to other jurisdictions to be burned in cement kilns, asphalt plants, etc. An unknown amount of used oil is disposed in landfill sites and poured down sewers or onto land, contaminating surface and/or ground water and soil. In addition, approximately 75 million litres of used oil is imported by Safety-Kleen from other jurisdictions to be re-refined at its Breslau facility.

Used oil collection services are not provided by the private sector in all rural and remote areas of the province, or by all municipalities. Despite this limitation, a 2004 study conducted at the request of the Ontario Waste Management Association and the Ontario Used Oil Management Association (OUOMA) by Klaassen & Associates reported that approximately 79 per cent of all of the used oil generated in Ontario is collected from southern Ontario and the populated areas of northern Ontario. In 2005, municipalities collected approximately 2.6 million kilograms of used oil, some of which came from do-it-yourself consumers (i.e., consumers who do their own oil changes).

Environmental Impacts of Burning Used Oil versus Re-refining Used Oil:
Numerous studies have been conducted on the environmental impacts of burning used oil and of re-refining. For instance, in 1997, an Ontario study described in the journal, Hazardous Materials Management, reported that space heaters burning used oil emitted far more sulphur (di)oxide, metals and particulates than space heaters burning natural gas, but substantially less carbon monoxide and volatile organic compounds. A Vermont study concluded that space heaters burning used oil emitted far more particulates, chromium and lead than space heaters burning No. 2 home heating oil. In 1999, arsenic and chromium and their compounds, benzene, PAHs and lead, all of which are found in used oil, were listed as toxic substances under the *Canadian Environmental Protection Act*. In 2003, used crankcase oil, was added to the list of toxic substances because it may have an "immediate or long-term harmful effect on the environment or its biological diversity."

In 2004, the California Environmental Protection Agency (EPA) concluded that burning used oil without pollution controls was worse than re-refining in a number of ways including ecotoxicity (human, terrestrial and aquatic), emissions of heavy metals and depletion of ozone. Although the EPA also concluded that burning used oil without pollution controls was marginally better than re-refining in terms of global warming, it estimated that space heaters accounted for approximately seven per cent of the total zinc air emissions in the United States. A 2005 U.S. Department of Energy report advised that burning used oil in space heaters released approximately 50 per cent of the lead, cadmium, chromium and zinc found in the used oil to air; whereas burning used oil in facilities with pollution controls released much less and re-refiners released none since the metals were deposited as a solid. The report stated that "emissions from these units (space heaters) could create locally high concentrations of metal-containing particulates due to the limited dispersion characteristics of the stacks."

Studies have also been done of the energy recovery rates of re-refining used oil. The 2005 U.S. Department of Energy report summarized data for various studies and concluded that the overall energy savings for re-refining versus burning in facilities with pollution controls were 6 – 16 per cent, and that the energy savings of re-refining versus burning in space heaters were "essentially neutral."

Some of the studies demonstrating the environmental benefits of re-refining over burning have been criticized as being incomplete, out-of-date, and failing to consider societal and economic factors. Groups that support burning used oil in space heaters over re-refining argue against evaluating the environmental impact of burning used oil in space heaters solely based on emissions during operation. These groups contend that:

- Improvements in the operating efficiency of space heaters and the removal of lead from gasoline have reduced some types of emissions.
- Facilities that burn used oil value this source of cheap fuel and ensure that it is not spilled or contaminated. Since volumes stored on site are small, spills would also be small.
- Transporting used oil to re-refineries increases vehicular emissions and the risk that a large volume of used oil is spilled causing potentially major environmental damage.
- Facilities will have to replace the used oil with an alternative fuel, such as home heating oil, which will increase not only the demand for a dwindling natural resource, but also, the enormous environmental impact of crude oil exploration and extraction. Facilities will also face higher operating and capital costs.

These groups contend that these factors more than offset the environmental impacts of burning used oil on site in space heaters.

Regulatory History of Burning Used Oil in Space Heaters in Ontario:
Prior to 1992, only large specially equipped facilities, such as cement kilns burning used oil as an inexpensive fuel source, were granted Cs of A (Air) from MOE. In addition, the generation, collection and management of used oil were subject to the approval and manifest requirements in Part V of the *EPA* and Reg. 347, which facilities with space heaters that burned used oil found burdensome. In addition, many generators of used oil, particularly in rural and northern Ontario, had no access to used oil collection services and had few legal options except burning in space heaters for disposing of their used oil. Concerns were voiced that some generators would dump their used oil illegally. In addition, the destination of 90 per cent of the used oil generated by do-it-yourself consumers was not known. Concerns about the illegal disposal of used oil escalated after the collapse of a voluntary program that encouraged do-it-yourself consumers to take their used oil to auto repair facilities.

In 1992, MOE made changes to the used oil policy and regulatory framework to provide more convenient management options. Reg. 347 was amended to allow the creation of "waste-derived fuel sites" and to exempt them from the approval requirements. Retail auto repair facilities that generated used oil and burned less than ten tonnes of it as fuel daily, and facilities operating prior to September 26, 1992 were allowed to burn used oil with only a C of A (Air). In addition, they were allowed to mix other wastes generated at the site with the used oil. Since these changes addressed only some of the immediate concerns, MOE outlined a longer-term policy for managing used oil that did not include burning as a preferred management approach. In its "Guiding Principles for the Development and Implementation of a Used Oil Action Plan for Ontario," MOE stated that "the only acceptable forms of managing used oil are by re-refining or reprocessing for reuse as a lubricant" and required the development of a collection network that included remote areas and northern Ontario. Retail auto repair facilities and sellers of oil were encouraged to become used oil depots, i.e., to accept used oil from do-it-yourself consumers and others. Amendments were made to Reg. 347 in 1994 that required owners of used oil depots to:

- have a C of A (Waste), register as a waste generator and to comply with the manifest requirements in Reg. 347; or

- register with MOE, obtain a written agreement for the collection and management of used oil with an approved hauler. With this option, owners were not required to have a C of A (Waste) nor to register as a generator or comply with the manifest requirements.

Although MOE advised owners that it was planning to make the "used oil depot" program mandatory in 1993, it never happened.

Burning of used oil in space heaters was allowed in 1992 based on the understanding that emissions would be "minimized by controlling the quality of the feedstock burned in these units." In addition, contaminant criteria were defined that were not "so stringent as to require the waste oil to be cleaner than low-grade, commercially available fuel oil (No. 6 oil)." Although the lack of collection services in rural and northern Ontario may have spurred these changes, facilities with space heaters in southern Ontario where collection services were available were also allowed to burn used oil often in close proximity to residential areas, schools and other sensitive uses. Today, over 70 per cent of the Cs of A (Air) for space heaters burning used oil are for facilities located in southern Ontario.

Despite the 1992 and 1994 amendments to Reg. 347, concerns about emissions from space heaters, compliance issues and a growing awareness of the 3Rs continued to focus attention on the practice of burning used oil. In 1998, the government ordered a moratorium on approvals for new space heaters. Facilities with Cs of A (Air) were allowed to continue to burn used oil. In 2000, the City of Toronto passed a by-law banning the practice even though some legal experts believed that, at the time, the City did not have the legal authority to ban a practice for which the province had issued Cs of A (Air).

As a result of MOE district staff reporting widespread non-compliance with environmental regulations, MOE conducted an inspection sweep of 162 autobody shops and 209 auto repair facilities in 2002/2003 and found that 79 per cent of them did not have written agreements for waste disposal and 54 per cent did not have Cs of A (Air). At the time, MOE estimated that there were approximately 10,000 auto repair garages and 2,500 autobody shops in Ontario. The actual number of facilities using space heaters to burn used oil was not reported. The 2002/2003 inspection results were consistent with the findings of the Auditor General in 1991.

After the legality of an indefinite moratorium was challenged, MOE began issuing Cs of A (Air) for space heaters burning used oil in 2003 and committed to regulating the practice. That same year, MOE took the first step towards developing a waste diversion program for used oil when it designated used oil under the *Waste Diversion Act* (*WDA*). Under the *WDA*, a waste diversion program must be drafted for the designated material by stakeholders under the direction of Waste Diversion Ontario (WDO), a non-governmental organization created by MOE. The waste diversion program must promote the reduction, reuse and recycling but not burning of the designated material. MOE requested that the waste diversion program for used oil include all generators of used oil including agriculture, and that it improve collection services in remote areas and northern Ontario. A draft used oil waste diversion program was prepared by the stakeholder group, OUOMA. However, in 2004, the WDO rejected the draft program, in part because it included burning of used oil as a diversion approach. The proposed program was also criticized for setting a target diversion rate of 75 per cent within five years, despite a study commissioned by OUOMA indicating that that this rate had already been achieved. In 2006, MOE announced that it was cancelling this initiative.

With the exception of Ontario, all provinces and territories allow used oil to be burned in space heaters, although Quebec only allows the practice in greenhouses. Most U.S. states also allow the practice. In a 2001 report prepared for the European Commission, Taylor Nelson Sofres Consulting found that most member countries favoured burning used oil in cement kilns, asphalt plants and other industrial facilities over re-refining despite a 1975 directive that gave re-refining priority over burning. The directive also banned the burning of used oil in space heaters, although the practice continued in some countries. The directive is under review and may be replaced with a directive that emphasizes collection of used oil and prevention of environmental damage by improper disposal.

Implications of the Decision

MOE contends that, without this ban, the volume of used oil burned in space heaters could triple if heating costs continue to increase. MOE also contends that the ban will create a fairer marketplace since it removes the economic advantage of heating with used oil instead of more environmentally friendly methods. Since all of the replacement heating options are more expensive than heating with used oil, the operating costs of facilities subject to the ban will increase and capital expenditures may be required if they replace their space heaters. The ban should increase the volume of used oil available for re-refining, burning in facilities with pollution controls and for export.

The net reduction in emissions of greenhouse gases, metals and various pollutants will depend on the nature of the replacement heating option, and the management approach selected for the used oil, e.g., re-refining, burning in a facility with pollution controls or export. Some used oil may continue to be disposed illegally.

Public Participation & *EBR* Process

The proposal was posted on the Registry on January 11, 2007 for comment by February 10, 2007, i.e., within 30 days. On the same day, a news release was posted on MOE's website and a news conference was held at the Safety-Kleen re-refinery. At the request of stakeholders "shocked" by the announcement of the proposed ban, MOE met with them on January 23, 2007. Some stakeholders were advised of the proposed ban in a letter dated January 29, 2007, and were asked to submit comments by February 10, 2007. After receiving numerous complaints about the deadline, MOE extended the comment period on February 8, 2007 by three weeks.

Five hundred and sixty written comments were received. Many of the 117 comments that supported the proposed ban were submitted by the public based on a sample letter that described emissions from space heaters as causing cancer, and damaging respiratory and reproductive systems. MOE also received 441 comments expressing concern about the proposal. Many of these comments were sent by interested parties and stakeholders based on sample comment letters posted on the Internet.

Motivation for the Ban was Political and not based on Science:
Many stakeholders, including a consultant, owners and a supplier of space heaters, believed that the ban was a political move. Some stakeholders advised that MOE had admitted that there would be no overall benefit to air quality and that there was very little science to support the proposal. Commenters also believed that the ban was a backroom deal between MOE and Safety-Kleen, which announced expansion plans on the same day that the ban was announced. Many commenters explained that the proposal not only penalizes small businesses who have invested thousands of dollars in equipment and complied with regulations, but favours a company, which has a "virtual monopoly" on providing collection services.

Many commenters contended that burning on-site saves money on heating costs, reduces liability associated with the handling of used oil, and is an environmentally responsible method of preventing pollution. Commenters such as Prime Environmental Services Inc. (Prime), a consultant to owners of space heaters, and De-On Supply Inc., a supplier of space heaters, contended that re-refining will result in more emissions, and increased risk of spills that would contaminate land and water. Prime calculated that the greenhouse gas emissions of burning used oil and No. 2 heating oil in a space heater were virtually the same. Many commenters contended that several of MOE's statements related to the environmental benefits, e.g., greenhouse gas reductions, were "misleading and false." They advised that space heaters are operated only during the colder months; whereas re-refiners operate year-round, implying ongoing emissions. They noted that MOE had approved over 700 sites indicating that space heaters meet MOE's emission standards. Some commenters observed that Safety-Kleen's sulphur dioxide emissions have increased by 107 per cent in three years and reported on its history of environmental convictions in the U.S.

According to some commenters, Ontario already had the toughest regulations in North America. Since other jurisdictions give cash and tax incentives to facilities burning used oil, Ontario should consider doing the same or provide cash incentives to replace space heaters.

OUOMA noted that, since the 1990s, space heaters have operated at higher temperatures "resulting in lower emissions of contaminants of concern" and that emissions are well within MOE's waste-derived fuel criteria for lead, cadmium, arsenic, chromium and total halogens and point of impingement standards. In addition, the quality of used oil has improved – lead content is substantially lower and PCBs haven't been detected for many years.

OUOMA and others questioned MOE's statistic that re-refining at Safety-Kleen reduces greenhouse gas emissions by 500,000 tonnes annually. Several commenters complained that MOE failed to respond to their requests for evidence supporting MOE's statements of the environmental benefits of the ban. One commenter advised that MOE had assumed facilities would convert to wind, solar or electric heating when it calculated the CO_2 savings per space heater.

Ban Will Increase Costs:
The Ontario Automotive Recyclers Association (OARA), which represents 150 automotive recyclers in Ontario, suggested that the ban will place Ontario businesses at a competitive disadvantage since the costs of adopting alternative heating sources will be higher. Automotive recyclers will need to pass on these costs to their clients who may opt to dispose of their vehicles illegally, potentially harming the environment. The Ontario Trucking Association (OTA) noted that compliance with the ban will cost a mid-size trucking company of 200 trucks about $30,000 in one-time charges and $62,000 in additional operating costs annually. Other commenters, including the Canadian Federation of Independent Businesses, were also concerned about the economic impact of this ban on small businesses, using terms such as "devastating blow," punitive and unfair.

Additional Stakeholder Consultation is Required:
Numerous stakeholders complained that they had not been consulted prior to MOE announcing the ban and suggested that additional consultation was required. OARA noted that it received MOE's letter requesting input on the proposal one day prior to the due date and many other stakeholders advised that they had less than ten calendar days to comment on the proposal. Some commenters suspected that Safety-Kleen was consulted in advance of the announcement.

Exemptions Should Not Be Allowed:
Several commenters, including the Recycling Council of Ontario (RCO), Newalta (a re-refiner) and Canadian Environmental Law Association (CELA), suggested that the ban be extended to include burning in all space heaters, including those used in agriculture. EnviroWest Inc., a stakeholder that collects and manages the majority of the used oil in northern Ontario covered by this proposal, also objected to the proposed exemption for northern Ontario, stating that the exemption is "a step backwards." Safety-Kleen indicated that it also offers used oil collection services in parts of northern Ontario. RCO wrote that MOE should develop used oil recovery programs specific to the exempted groups. The Sierra Legal Defence Fund (SLDF, now "Ecojustice") suggested that the ban be extended to include northern Ontario and agriculture where current used oil collection services are available. The SLDF noted that northern Ontarians deserved the same level of environmental protection as southerners and that this suggestion would reduce the likelihood that used oil from southern Ontario will be shipped to northern Ontario for burning.

The Medical Officer of Health for the City of Toronto suggested that the ban be extended to include cement kilns, blast furnaces, industrial boilers and other industrial users and that the government should promote the use of cleaner fuels.

Need to Implement a Manifest System:
Some commenters including Safety-Kleen suggested that MOE consider requiring the use of manifests by used oil haulers to assist in determining volumes collected and to discourage the export of used oil to jurisdictions that allow burning. Safety-Kleen estimated that about half of the used oil generated in

Ontario is not tracked and is being shipped to the United States to be burned as waste-derived fuel instead of being re-refined.

Other Comments:
SLDF noted that the proposal was logical since the government was planning to phase-out coal-fired electricity generating facilities which emit fewer pollutants than burning used oil and that the government should ensure that all of Ontario is serviced with used oil collection within five years. SLDF and CELA suggested that the ban come into force one year earlier than being proposed, since facilities that burn used oil are often located next to residential areas, schools and retirement homes.

Effect of the Comments:
As suggested by some commenters, MOE changed the definition of northern Ontario to ensure that it was consistent with other documentation. No other changes were made.

SEV

In a brief statement, MOE noted that the decision confirmed "MOE's goal of ensuring environmental protection by providing appropriate rules for the management of used lubricating oils that may inadvertently or without regard enter the environment." MOE also noted that the decision takes an ecosystem approach since it reduces the "less than state-of-the art management of used oil" when "superior options are available." Lastly, MOE noted that the decision promotes resource conservation by diverting waste.

Other Information

Using data provided in the Klaassen study, Safety-Kleen advised that Ontario has the highest used oil recovery rate in Canada and one of the highest in the world. It believes that several factors have contributed to achieving this recovery rate including requirements for used oil generators and collectors to register, holding generators responsible for used oil until its ultimate disposition, and tracking the movement of used oil from generator to final disposition via the manifest system. Safety-Kleen estimated that 49 per cent of the collected used oil is re-refined and 51 per cent is burned.

According to Taylor Nelson Sofres Consulting, the average collection rate of used industrial and motor oils in the European Union was 70-75 per cent in 2000. Approximately 33 per cent of the collected used oil was re-refined and 35 per cent of waste oil was burned in cement kilns in 1999.

ECO Comment

The ban on burning used oil in space heaters in southern Ontario was long overdue. Used oil is a non-renewable resource that should not be consumed if it can be reused over and over again. Used oil collected for re-refining is subject to more rigorous testing, approval and manifesting requirements. Its source, quality, quantity and management are known. The ban fulfills a commitment made by the government in 2003 when it resumed granting approvals and supports the principle established in the early 1990s that re-refining is "the only acceptable form of managing used oil." The ban should send a signal to used oil generators that the provincial government considers re-refining the most appropriate approach to managing used oil and that burning it in space heaters is not the preferred option.

However the ECO recognizes that strict adherence to waste diversion principles that rank re-refining over burning may not always be the most protective of the environment after other factors are considered. In its SEV approved in 1994, MOE states it "will take into account social, economic and other considerations; these will be integrated with the purposes of the *EBR* and [its] Guiding Principles in environmental decision-making. In making decisions, the ministry will use science that meets the demanding standards of the scientific community." In this decision, MOE cited the lack of used oil collection services as the reason for not including northern Ontario in the ban. However some areas are already being serviced according to Safety-Kleen and EnviroWest Inc. indicating that they believe the benefits to be there. Furthermore, it is not clear that MOE did any other analysis to support its decision to exempt northern Ontario. An assessment of the environmental impacts of transporting used oil from northern Ontario to a re-refiner in southern Ontario or elsewhere would have provided strong evidence for or against extending the ban to northern Ontario, and would have allowed MOE to determine how far used oil could be transported before the environmental benefits of re-refining were negated by the environmental impacts of transportation. In addition, an analysis of the environmental, economic and social impacts of replacement heating options available to northern facilities would have helped determine other potential obstacles to extending the ban to northern Ontario and potential solutions. The ECO urges MOE to assess whether or not the ban could be extended to larger municipalities in northern Ontario.

The 1992 amendments to Regulation 347 provided facilities generating used oil in areas without collection services with a legal and convenient approach to managing their used oil. However, most of the facilities that benefited from these amendments were from southern Ontario where collection services were available. The ban reverses this unintended consequence.

Nevertheless, there are several very troubling aspects of this decision. For example, MOE did not address the loophole created by the 1994 amendments that allows used oil to be collected from some facilities without being subject to any approval and manifest requirements under Reg. 347. As a result, we still won't know how much used oil is being collected from these facilities nor will we know if it's being managed appropriately or being dumped illegally. The ECO urges MOE to close the loophole in Reg. 347.

Although MOE complied with the minimum consultation requirements defined in the *EBR*, these requirements were not intended to replace appropriate stakeholder consultation. Despite knowing who the primary stakeholders were, MOE waited 18 days before sending them letters inviting comments on the proposed ban. Initially, many of them had only days to respond. Later, MOE did extend the deadline by three weeks. Effective consultation with stakeholders, not just with the general public, is important to ensure that proposals are understood and well-crafted and to maintain constructive relationships.

Lastly, the ECO is troubled by MOE's failure to provide verifiable evidence to support the need for the ban and counter stakeholder concerns that the decision was political not scientific. Not only was there considerable confusion over MOE's statements of the environmental benefits, some of the benefits appear to be over-stated. For instance, MOE stated that an additional seven million litres of used oil, the amount being burned in space heaters in southern Ontario, will be re-refined. However, these facilities are not required to select re-refining and may choose a less preferable approach, such as exporting their used oil or having it burned in facilities with pollution controls. The ECO urges MOE to develop an education program that encourages them and other generators of used oil to send their used oil to a re-refiner so that its goal of increasing the amount of used oil re-refined is achieved.

Review of Posted Decision:

4.8 Amendments to Regulation 903, R.R.O. 1990 (Wells Regulation)

Decision Information:

Registry Number: 010-0098
Proposal Posted: March 22, 2007
Decision Posted: July 27, 2007

Comment Period: 32 days
Number of Comments: ~78
Decision Came into Force: December 31, 2007

Description

Regulation 903, R.R.O. 1990 (as amended), made under the *Ontario Water Resources Act* (*OWRA*), sets out the minimum standards for the design, construction, maintenance and decommissioning of all water wells in Ontario. Regulation 903 ("the regulation") also sets out the licencing requirements for those engaged in well construction and equipment installation.

On December 31, 2007, amendments to Regulation 903 came into force. The amendments, made by O. Reg. 372/07 and filed with the Registrar of Regulations on July 25, 2007, were intended to "improve clarity and enforceability of the regulation and build on amendments made to the regulation in 2003." More generally, the Ministry of the Environment (MOE) expects the extensive changes to the regulation to "better protect public health and drinking water supplies for Ontarians by protecting water sources through proper well construction standards and decommissioning requirements."

Background:
All water wells in Ontario, including municipal and private drinking water supply wells, agricultural wells, commercial wells, industrial wells, geotechnical test holes and environmental monitoring wells, are governed by the *OWRA* and Regulation 903.

Following the contaminated drinking water tragedy in Walkerton, Ontario in 2000, the Ontario government appointed Justice Dennis O'Connor to conduct the Walkerton Commission of Inquiry ("Walkerton Inquiry") and make recommendations to the government relating to safe drinking water and source water protection. Considerable evidence was presented at the Inquiry about the role of Regulation 903 in ensuring proper construction and decommissioning of water wells. Justice O'Connor's recommendation to review and update Regulation 903 "to ensure that it requires best construction practices" prompted MOE to announce a provincial groundwater strategy. In April 2002, as part of the new provincial groundwater strategy, MOE posted a notice on the Registry for proposed amendments to Regulation 903. MOE provided a 60-day comment period, yielding 67 comments from stakeholders and the public. MOE also consulted with the water well industry on the proposed amendments.

Regulation 903 was subsequently amended by O. Reg. 128/03 and a decision notice was posted in April 2003. The 2003 amendments included new provisions relating to well tagging, annular seals, abandonment of wells, shallow works, disinfection and cluster well reporting. The ECO commented on the decision in our 2003-2004 Annual Report (page 110) and identified numerous concerns with the amended regulation. The ECO recommended that MOE "ensure that key provisions of the Wells Regulation are clear and enforceable," and "provide a plain language guide to the regulation for well installers and other practitioners."

The amended regulation of 2003 also attracted criticism from stakeholders, who expressed a variety of concerns about its interpretation, application and enforcement. Within a few months after Regulation 903 was amended in 2003, the ECO received a detailed *EBR* application seeking a review of the amended regulation (see the Supplement to our 2003-2004 Annual Report, pages 223–233). The applicants believed that the amended regulation was inadequate, created confusion, failed to ensure disinfection of wells, and could be difficult to enforce. MOE declined the application and defended the regulation's safety and technical merits.

In our 2005-2006 Annual Report (page 51), the ECO provided an update on Regulation 903 and the ongoing problems identified in the regulation, including issues with disinfection requirements, lack of guidance to the industry, enforceability and monitoring. Although the ECO obtained a written commitment from MOE in November 2005 to post further amendments to Regulation 903 on the Registry, MOE had not followed through. The ECO expressed concern that Regulation 903 was impeding groundwater monitoring at a time when Ontario most needed environmental monitoring to support source water protection.

In March 2007, in response to stakeholder concerns, the ECO's recommendations, and advice from the Advisory Council on Drinking Water Quality and Testing Standards (now the Ontario Drinking Water

Advisory Council), MOE posted a proposal for further draft amendments to Regulation 903 on the Registry for public comment. The amendments were subsequently made in July 2007 by O. Reg. 372/07.

The 2007 Amendments:
The amendments made by O. Reg. 372/07 involved a significant re-organization of existing provisions and re-ordering of sections in Regulation 903 "to more closely follow the order of activities in a well's life cycle from siting the well through construction." Ontario Reg. 372/07 also made numerous other amendments intended to improve the clarity and workability of the regulation.

Of the substantive changes to Regulation 903, the most notable include:

- creation of a new class of well technician licence;
- new exemptions from the wells regulation;
- new disinfection requirements; and
- expanded well abandonment provisions.

At the proposal stage, MOE indicated that once the amendments were finalized, MOE would prepare a Best Practices Manual "to aid well construction industry practitioners in implementing the new requirements of the Regulation." As of August 2008, MOE had not posted a draft Best Practices Manual on the Registry for comment.

New Well Technician Licence:
Only persons holding well technician licences under Regulation 903 are permitted to work on the construction of wells, unless they are exempt (see below). "Construction" includes reconstruction, improvement, extension, alteration, replacement and repairs to wells. The 2007 amendments create a new (fifth) class of well technician licence. Class 5 licences are now required for "monitoring, sampling, testing and non-powered construction" of wells. A Class 5 licence covers activities such as: installation of monitoring, sampling or testing equipment; installation of pumps in test holes and dewatering wells for monitoring, sampling or testing; and construction of test holes and dewatering wells without the use of power equipment. The amendments add provisions prescribing the education and experience requirements to obtain a Class 5 well technician licence. Professionals who are licenced or registered under the *Professional Engineers Act*, the *Professional Geoscientists Act*, or the *Ontario Association of Certified Engineering Technicians and Technologists Act, 1998* and who meet specified criteria are exempt from the requirement to obtain a Class 5 licence.

Other amendments clarify the types of activities that holders of the different classes of well technician licences are permitted to undertake, and make minor changes to the provisions governing examination and continuing education for well technicians.

Exemptions:
The 2007 amendments provide new exemptions from Regulation 903. A new section clarifies that certain items that fall under the broad definition of "well" (e.g., ponds, reservoirs, lagoons, artificial wetlands, canals, trenches, certain types of drains) are not subject to the regulation. The amendments also identify a number of "low-risk" well construction activities for which a well technician licence is not required (e.g., inspecting, monitoring, sampling or testing the well, or installing equipment in the well, in specified circumstances).

Disinfection:
In June 2004, the Minister of the Environment asked the Advisory Council on Drinking Water Quality and Testing Standards (now the Ontario Drinking Water Advisory Council) for advice on the disinfection requirements in Regulation 903. The Advisory Council provided recommendations to the Minister in June 2005 to correct what the Advisory Council characterized as Regulation 903's "deficient" disinfection requirements. The 2007 amendments replace the previous disinfection requirements with a new, longer section that details step-by-step requirements for disinfecting a well. The amendments reflect some of the Advisory Council's advice to MOE on the disinfection process, including dosage, contact time, pumping out and verification of free chlorine residuals. The 2007 amendments do not adopt the Advisory

Council's recommendation that bacteriological testing for total coliforms and *E. coli* be included in the disinfection process.

Previously, disinfection was only required at the completion of a well's "structural stage" (i.e., following initial construction of the well, not including pump installation or alterations). The 2007 amendments require that disinfection also be conducted following alterations to an existing well, such as installation of pumping equipment. When disinfection is required, the well must be dosed with 50 – 200 milligrams per litre of free chlorine until, after a 12 – 24 hour period, a test confirms that the concentration of free chlorine residual is between 50 – 200 milligrams per litre. The disinfection process must be repeated until the required concentration of free chlorine residual is achieved. The water must then be pumped out of the well until the free chlorine residual left in the well water is less than one milligram per litre. The well may not be used for any purpose during the disinfection process. The well water may not be used for human consumption until a written record of the test results is provided to the well purchaser.

The disinfection requirements to test for free chlorine residuals and pump out do not apply in urgent cases of alteration of an existing well (i.e., where a pump unexpectedly requires immediate replacement and there is no alternative water supply available). This exemption is only available if the well purchaser instructs the well constructor in writing to discontinue the disinfection process after dosing the well, and if the well purchaser ensures that the well is not used for any purpose until it is pumped out so that no odour of chlorine remains in the water. Disinfection is not required for "minor alterations," such as routine well repairs or installing a well cap.

Well Abandonment:
The 2007 amendments to Regulation 903 split the previous well abandonment requirements into two sections: the first section establishes the circumstances necessitating well abandonment, and the second establishes how a well must be abandoned.

Previously, if an owner, MOE or local residents discovered a well producing water that was not potable, contained natural gas or other gas, permitted movement of natural gas, contaminants or other materials that may impair water quality, or contravened regulatory requirements, the well owner had no option but to abandon (i.e., decommission) the well immediately, unless the well owner obtained written consent from an MOE Director. The 2007 amendments provide alternatives to automatic well abandonment. In the case of non-potable water, the well owner may now seek advice and take direction from the local medical officer of health, consistent with recommendations made in the Walkerton Inquiry report. In the other circumstances listed above, the well owner may take "measures" to manage or rectify the problem.

The amendments provide more options and direction for well decommissioning methods and materials, depending on the well size and site conditions. For example, clean, washed sand or gravel may now be placed in a well bore adjacent to water-producing zones or fractures. For wells with a diameter greater than 65 centimetres, the abandonment barrier used must now provide appropriate structural strength to support the weight of persons and vehicles that may move over the area after the well is abandoned.

Finally, the amendments clarify the types of wells that may be decommissioned by holders of the different classes of well technician licences.

Other Amendments:
Several definitions have been changed or added, including, for example, terms such as "minor alteration," "chlorinated," "well screen," and definitions to describe the various persons responsible for complying with parts of the regulation (i.e., "well owner" and "well purchaser").

Amendments to the venting requirements require that new wells, following construction by any method, be vented to the outside atmosphere to safely disperse all gases in the wells.

A new provision requires a person replacing a pump in an existing well, having completed the work, to provide the well owner with an MOE information package about wells.

Changes were also made to well tag requirements. Since 2003, well tags have been affixed to all new wells at the time of construction. A well tag provides a physical marker for a well or a cluster of wells, and identifies wells through a unique identification number also used on paper well records. As a result of the 2007 amendments, any person who alters an untagged well must obtain a well tag from MOE and prepare a new well record. Damaged or illegible well tags must be returned to MOE and replaced. For well clusters, the deepest well in the cluster must now be tagged. When a well or well cluster is abandoned, the well tag must now be returned to MOE along with a well record for the abandoned well.

Other amendments were made to provisions relating to shallow works, location of wells, casing, deepening wells, annular space, and well records.

Implications of the Decision

The *OWRA* regulates a variety of well types, including wells to locate or obtain groundwater, and wells for testing or information gathering. Wells provide a direct conduit from the ground surface to underlying aquifers. Poorly constructed, poorly maintained or unsealed abandoned wells therefore present a significant risk of contamination to the aquifers and the drinking water that they supply. With approximately 90 per cent of rural Ontarians dependant on wells to obtain their drinking water, and with an estimated 10,000 – 20,000 new wells constructed in Ontario each year, proper well construction and maintenance practices are critical to protecting groundwater resources and preventing contamination of drinking water for a significant portion of Ontario's population. With an estimated 500,000 - 750,000 unsealed abandoned water wells in Ontario today and perhaps an additional 6,000 wells being abandoned in Ontario each year, clear and enforceable well abandonment rules are vital to protect human health and the environment.

MOE has stated that the latest amendments to Regulation 903 will "strengthen protection of public health and safe drinking water supplies by helping to prevent contaminants from entering groundwater and other drinking water sources through poorly constructed wells."

In the past, the ECO has observed problems with Regulation 903 that fall generally into two categories: 1) interpretation and enforceability; and 2) environmental and health protection. These categories are not mutually exclusive; the ability of stakeholders to properly understand and apply the regulation, and for MOE to enforce the regulation, is critical to achieving MOE's stated goals in its 2008 Results-Based Plan to protect the environment and safeguard health. The 2007 amendments to Regulation 903 should result in some improvements to the clarity, interpretation and enforceability of the regulation, as well as the regulation's role in safeguarding the environment and public health.

Interpretation and Enforceability:
The amendments to the regulation that re-organize sections to consolidate issues and to follow the life cycle of a well should result in a more logical and understandable regulation. New and amended definitions, as well as clarifications to the language of many technical requirements, should also improve the ability of companies and technicians to comply with the regulations, and the overall transparency of the regulatory system.

A best practices manual that sets out, in plain language, detailed guidance for those engaged in well siting, construction, maintenance, and decommissioning will greatly assist both well owners and technical workers in understanding and complying with the regulation. Since previously vague and unenforceable provisions have been replaced with clearer language, MOE should find it easier to promote compliance with Regulation 903.

Environmental and Health Protection:
The new disinfection procedure, together with the new provision requiring disinfection of wells whenever alterations are made (not just at the time of initial construction) should greatly reduce the opportunity for bacteria to be introduced into the groundwater and enhance drinking water safety. The new well disinfection requirements fall short, however, of requiring any bacteriological testing. Bacteriological

testing, which is offered as a service by the Ministry of Health and Long-Term Care, remains a voluntarily initiative of well owners and users.

The broader range of options permitted for well decommissioning methods and materials should facilitate and encourage proper well abandonment practices, resulting in fewer improperly abandoned wells. Greater flexibility for dealing with wells for which abandonment is prescribed (i.e., wells producing non-potable water, containing gas or natural gas, etc.) may also avoid unnecessary well abandonment where taking alternative measures is a viable option. This could result in fewer new wells (and new conduits to groundwater) being constructed.

New well tag and well record requirements, including requiring older wells to be tagged and well tags to be returned to MOE on abandonment, will increase the quantity and quality of available information about wells in Ontario and could help MOE develop better well programs in the future.

Amendments to the technical requirements relating to well construction and maintenance (e.g., location of wells, casing, deepening wells, annular space, etc.) should generally improve the quality of well construction and maintenance and reduce the risk that wells present to the health and safety of groundwater resources. Improved well construction, maintenance and abandonment practices could also reduce the likelihood of accidents similar to that experienced by an eight-year-old Cayuga girl who, in February, 2008, survived an 18-metre fall into frigid water after the concrete lid covering a 1-metre diameter well crumbled under her feet.

Finally, it is worth noting that oil and gas wells are regulated separately from water wells, under the *Oil, Gas and Salt Resources Act* (*OGSRA*). The *OGSRA* defines "well" differently than the *OWRA*. The *OGSRA* and its associated regulation (O. Reg. 245/97) regulate petroleum resources in Ontario, including the exploration, drilling and production of oil and natural gas. The Oil, Gas and Salt Resources of Ontario Operating Standards ("Operating Standards") set out minimum technical standards for wells and works under the *OGSRA*, including "the design, installation, operation, abandonment and safety of wells and works." It is unclear how the amendments to Regulation 903 may interact with the *OGSRA* and its associated regulation and Operating Standards, or whether the *OGSRA* regime should be updated to reflect those amendments so that groundwater resources are protected not only from contamination in water wells, but from oil and gas well operations approved under the *OGSRA*.

Public Participation & *EBR* Process

MOE initially posted a proposal notice on the Registry on March 22, 2007. The proposal notice was re-published on April 3, 2007 to update the French version of the notice. The proposal notice included a link to the draft regulation, a copy of a sample well record, as well as a helpful compendium that summarized and explained the proposed changes. The proposal notice also included links to additional information about drinking water safety and disinfection found on the websites for the Ontario Drinking Water Advisory Council and the Ministry of Health and Long-Term Care.

MOE provided a 32-day comment period, between March 22, 2007 and April 23, 2007. The proposal generated considerable interest from stakeholders. MOE reported that it received 24 comments in writing and 54 comments online, for a total of 78 comments (although the decision notice also states that a total of 73 comments were received, likely indicating that some comments were submitted both in writing and online). A significant proportion of the comments came from the environmental and geotechnical industry. The remaining submissions came from municipalities and municipal system operators, conservation authorities, the water well industry, professional organizations, provincial government, environmental non-governmental organizations (ENGOs), and universities.

Prior to posting the proposal on the Registry, MOE had also consulted extensively with stakeholders about their concerns with the 2003 amendments to the wells regulation. The Ontario Ground Water Association (OGWA) reported that MOE worked with OGWA "in a transparent and tireless manner in the time since the last amendments to Regulation 903…" During the 32-day *EBR* comment period, MOE also hosted information sessions for stakeholders to discuss the proposal.

MOE clearly considered the public comments received through the *EBR* process, and used some of the public's feedback to revise, refine and clarify the amendments to the regulation. In its decision notice, MOE included a summary of some additional amendments to the wells regulation as a result of public comments received. However, many other public comments were not addressed in the decision notice.

Summary of Comments:
The public comments expressed general support for the government's efforts to improve, clarify and strengthen Regulation 903 – a step that, in the view of many stakeholders and the public, was much-needed and long overdue. However, commenters across the board were dissatisfied with many of the proposed changes and expressed continued concern about the interpretation and application of the regulation. One commenter stated that while the proposed amendments represented an improvement, the regulation would continue to be "a labyrinth of exceptions and prescriptions." Commenters made many specific technical suggestions and requested clarification on a number of proposed changes. Commenters also identified a critical need for the guidance manual promised by MOE to be clear, comprehensive and thorough.

Some of the key issues raised by commenters are summarized below.

Definitions:
Many commenters noted the lack of definitions for important terms used in the proposed amended regulation, creating continued uncertainty in the interpretation of the regulation. Other commenters requested that existing definitions be clarified. Some commenters specifically identified the need to revise the definitions of "well owner" and "well purchaser" to reflect current practices (e.g., where a consultant retains a contractor to drill a monitoring well on the landowner's property, or where a Regional Municipality contracts for construction of a well on land owned by the local municipality), and to clarify the roles of all potential people who may be responsible for a well, including tenants, lessees and employees of corporate landowners.

Exemptions:
Some commenters objected to the exemption from the regulation of certain items that are captured by the definition of "wells." For example, the Canadian Environmental Law Association (CELA) urged MOE to reconsider a blanket exemption of ponds from the regulation, because excavated ponds that are fed by groundwater "have the potential to affect the quantity and quality of groundwater." Evidence suggests such a pond may have played a role in contaminating the water supply in Walkerton in May 2000. Similarly, a dewatering company objected to the proposed exemption of trenches, tile drains and ditches on the basis that any excavation that intercepts the groundwater and extracts, diverts, channels or alters the water should be subject to the same regulation as wells.

A significant number of commenters addressed the proposed exemption from the requirement to have a well technician licence to carry out specified "low-risk" well construction activities. Although some commenters agreed that the exempted activities are relatively low-risk, they believed that the provision is too broad and could lead to the introduction of contaminants into the groundwater. One environmental consultant opined that "offering carte blanche access to wells by untrained, inexperienced individuals is a mistake" as it will make wells more vulnerable to contamination. Some commenters suggested that mandatory educational and practical courses should be required for any individuals who undertake the exempted activities. Several commenters sought general clarification about the scope of the proposed exemption, which one commenter described as "confusing."

The Ministry of Transportation suggested that highway construction wells be exempt from the regulation, similar to mineral exploration wells.

New Well Technician Licence:
Many commenters supported the creation of a new class of well technician licence (Class 5), while others considered an additional class of licence to be unnecessary. A significant number of comments were limited to expressions of support for an exemption from the requirement to obtain a Class 5 licence for

professional engineers, professional geoscientists and certified engineering technicians and technologists. Most commenters articulated similar rationales for such an exemption: first, that by virtue of their training and qualifications those professionals are competent to carry out the type of work covered by a Class 5 licence; and, second, that those professionals are licenced and regulated under their governing statutes and are already subject to stringent qualification and reporting requirements, as well as a disciplinary process for non-compliance. Some commenters, including municipalities, suggested that certified water treatment plant operators, certified drinking water operators and Conservation Authority staff should also be exempt from requiring a Class 5 licence.

There was some opposition to the proposed exemption for certain professional groups. An environmental consultant and a well driller argued that not all exempted persons would have any or adequate experience working with wells, and that membership in a professional organization would not guarantee that the professional would adhere to ethical standards. The opponents believed that such an exemption would present a risk to important groundwater resources.

Disinfection:
Some commenters believed that the proposed amendments to well disinfection requirements were unnecessary, too onerous and impractical, particularly the requirement to return to the well 12-24 hours after dosing to check for free chlorine residuals. Other commenters were concerned that the proposed disinfection requirements did not go far enough. In particular, commenters noted that the proposed amendments did not incorporate the Advisory Council's recommendation that wells be tested for total coliforms and *E. coli* as a final step in the disinfection process. CELA strongly opposed this omission, stating that "[i]n the post-Walkerton era, CELA finds it unconscionable that the MOE is refusing to fully implement the expert advice of ODWAC regarding disinfection, and that MOE is proposing a disinfection standard that still does not meet 'best practice' requirements in other leading North American jurisdictions."

Abandonment:
Some commenters applauded the greater flexibility for well abandonment provided by the proposed amendments. Others identified uncertainties created by the lack of definitions for "immediately," "potable," and "natural gas or other gas." Commenters noted the lack of detail about what "measures" would be acceptable to excuse a well owner from the requirement to abandon a well, and noted the lack of process for consulting the Director to obtain consent to not abandon. Several commenters believed that seeking input from the local Medical Officer of Health in cases where a well is producing non-potable water would add an unnecessary layer of complexity to the regime. Further, commenters (including a district health unit) noted that such involvement would be outside the Medical Officer of Health's mandate. Commenters also stated that the Medical Officer of Health would lack the necessary expertise to provide advice in cases where water is made non-potable by non-bacterial causes such as pesticides, leachate contaminants, polycyclic aromatic hydrocarbons, PCBs, and other substances.

Several commenters from different stakeholder groups strongly disagreed with the proposed amendment that specifically permits a well owner or other non-licenced person to abandon the owner's well. OGWA recommended that "only licenced contractors and technicians be allowed to work on wells and well systems." Some commenters suggested that the government should instead provide financial assistance to well owners to have their wells decommissioned by professionals.

Some commenters argued that well owners should not bear the responsibility and cost of abandoning their wells if the wells require abandonment (or other measures) due to off-site impacts created by others.

Well Tags and Records for Well Clusters:
A number of stakeholders opposed permitting the use of one well tag and one well record for clusters of wells, which commenters characterized as "incompatible with source protection goals," bad practice, and likely to lead to confusion. Conservation Ontario stated that "assigning one well tag to an entire cluster might create confusion and prolong timelines should there be an incidence of contamination in one of the wells in the cluster." A municipal commenter recommended that cluster well records only be permitted for geotechnical boreholes with no wells installed, temporary wells, dewatering wells permanently connected

together via a header system, and geothermal wells permanently connected together via a geothermal system. Commenters argued that all permanent wells should have individual well tags and well records.

Location of Wells:
Commenters from the environmental and geotechnical consulting industry were concerned that the proposed well location requirements would inhibit locating test wells at low points of elevation, which is necessary to assess groundwater and subsurface conditions. One professional association recommended that geotechnical boreholes be exempt from the well location requirement.

Determining the proper clearance distance for constructing a well near a domestic septic system was identified as a significant and ongoing barrier to complying with the well location requirement. Previously, the standard minimum separation distance of 15 metres was prescribed in Regulation 358, R.R.O. 1990, under the *Environmental Protection Act*. Since the 2003 amendments, Regulation 903 has stipulated that the required clearance distance should be determined by referring to O. Reg. 350/06 (formerly 403/97) under the *Building Code Act*. However, O. Reg. 350/06 does not set out a standard minimum separation distance; rather, a well contractor who plans to construct a well near a septic system must now undertake and complete a complex approval process including obtaining various assessments, tests and approvals granted by a building official to determine the site-specific clearance distance required.

CELA expressed concern that the prescribed separation distances set out in O. Reg. 350/06 between new wells and "sources of pollution" (a term that is not defined) are "somewhat arbitrary if not highly questionable" and could result in locating new wells in close proximity to sources of groundwater contaminants such as sewage, nutrient management facilities and petroleum or chemical storage. CELA recommended that MOE establish a general duty upon well constructors "to use all reasonable care to prevent new wells from being sited in locations where the wellwater may be impaired from on-site or off-site sources of contaminants" and that MOE consider a permitting system for some classes of wells that would require a proposed well location to be approved by MOE staff before the well may be constructed.

Other Comments:
Many comments were made about specific requirements of the amended regulation, e.g., those related to shallow works, annular space, well caps, well development, venting, casing, abandonment materials, record-keeping, the sample well record, and other issues.

A recurring observation by commenters was that MOE's attempt to regulate, in one document, different types of wells constructed for different purposes has resulted in a very complex regulation. One environmental consultant argued that modifying a regulation that was developed for the water well industry to apply to geotechnical investigation boreholes, without fully understanding the needs of the geotechnical engineering business, is "fundamentally flawed." Another commenter opined that "somewhere along its development, the regulation lost its way in trying [to] capture too many activities which have nothing to do with drinking wells..." These comments reiterate concerns expressed by the geotechnical industry during consultation for the 2003 amendments about applying the same standards for water wells to test holes, dewatering wells and monitoring wells. During consultation for the 2007 amendments, some commenters suggested that the regulation be divided into two distinct parts: one that applies to potable (water supply) wells, and the other to address all other water wells including test holes, monitoring wells and dewatering wells. Other commenters suggested that MOE develop a separate regulation and best practices manual specifically devoted to environmental and geotechnical test holes. Still other commenters advocated for special attention in the regulation to municipal and communal wells.

Another key issue identified by some commenters was the availability (or lack thereof) of resources and programs to enforce the regulation. CELA articulated one of its main concerns as "MOE's institutional ability to conduct inspections and enforce Regulation 903 standards in a timely and effective manner." The Ontario Groundwater Association requested that MOE "embark on an inspection and enforcement program that will ensure that all licenced contractors and technicians in Ontario adhere to Regulation 903 and all unlicenced contractors and technicians are identified and appropriately reprimanded, become licenced or cease working in the ground water industry." For further discussion of this issue, see "Other Information" below.

SEV

MOE considered the three guiding principles in its Statement of Environmental Values (environmental protection, the ecosystem approach, and resource conservation) in making this decision. MOE concluded that "[t]he proposed amendments will improve environmental protection by preventing contamination of groundwater resources through improved well construction." MOE claimed in its SEV Briefing Note that the proposed amendments would not affect the function of ground and surface water in the hydrologic system. MOE also stated that the proposed amendments would not affect the protection and conservation of Ontario's surface resources, but that they complement other provincial regulations and policies aimed at protecting and conserving Ontario's surface and groundwater.

Other Information

MOE Resources:
On April 24, 2007, the ECO issued a Special Report to the Legislative Assembly of Ontario entitled *Doing Less with Less: How shortfalls in budget, staffing and in-house expertise are hampering the effectiveness of MOE and MNR.* The Special Report identified a "gradual but steady erosion of funding, staffing and expertise" in the ministries of Environment and Natural Resources, affecting core functions such as inspection, compliance, enforcement and monitoring.

A case study in the Special Report, entitled "MOE budget cuts drastically reduce water well inspection, industry oversight," noted that all full-time water well inspector positions at the ministry were eliminated between the late 1980s and mid-1990s. Although the 2003 amendments to Regulation 903 expanded MOE's responsibilities for regulation of water wells, as of early 2007 MOE did not have any staff dedicated to investigating private drinking water well construction, repair or abandonment operations on an on-going basis. The ECO stated, "[g]iven the importance of groundwater to millions of Ontarians, the public would expect MOE to have a program to guard against improper well construction and inadvertent water contamination." The ECO concluded that "[w]ith hundreds of thousands of active and abandoned wells in the province, and with hundreds of well contractors operating in the field, MOE should have greater capacity to carry out well inspections."

The ECO continues to be concerned about the level of resources available to MOE to effectively carry out its important function of administering and enforcing the wells regulation.

Process Issue:
On August 25, 1998, MOE posted a proposal notice on the Environmental Registry (Registry number RA8E0025) for "Proposed amendments to Regulation 903 (Water Wells) made under the *Ontario Water Resources Act.*" The ECO noted in our 1998-1999 Annual Report that a decision notice had not been posted for this proposal, and flagged this proposal again in our 2000-2001 and 2001-2002 Annual Reports under "Need for Action" and "Late Decision Notices." In our review of the 2003 amendments to Regulation 903 in the Supplement to our 2003-2004 Annual Report, the ECO observed that the outstanding 1998 proposal notice "is potentially confusing to a member of the public who may be tracking this issue. MOE should have closed that particular posting with a decision notice (if this in fact was the case at the time) and notified the public that a new consultation process was underway."

As of August 2008, the 1998 proposal notice (now almost 10 years old) remains posted on the Environmental Registry despite the fact that two more recent consultations on this regulation have been completed. To avoid further potential for confusion in the future, the ECO urges MOE to revise the 1998 proposal notice by posting a decision notice without delay indicating it has been superseded by subsequent developments.

ECO Comment

Regulation 903 is one of the most important tools available to MOE to protect public health and the environment. For too long Regulation 903 has been difficult to interpret, implement and enforce, exposing groundwater resources in the province to unacceptable and unnecessary risk. The ECO welcomes MOE's long overdue efforts to clarify and revise this poorly-written regulation and strengthen its environmental and public health protection functions through stricter well construction, disinfection and abandonment requirements.

The ECO is pleased with the level of consultation on this decision. However, the ECO believes that MOE should have taken swifter action to respond to stakeholder concerns; it was evident soon after the 2003 amendments were made that there were significant problems with Regulation 903, and yet the draft amendments were not posted until March 2007. Further, MOE should have considered providing additional time for the public to comment on the proposed amendments given the importance of the issues, the extensive nature of the amendments, and the degree of stakeholder and public interest evidenced by the number of comments that were received during the 32-day comment period.

On the whole, the ECO believes that these amendments will strengthen the regulation of wells in Ontario and, consequently, improve the protection of aquifers and drinking water. MOE addressed many of the deficiencies in the regulation that the ECO had identified in our previous Annual Reports. If MOE follows through with a clearly written and detailed guidance manual, well owners, installers and other practitioners will be better equipped to navigate and apply this complex regulation.

However, many of the public's concerns with the regulation remain unaddressed, and Regulation 903 will continue to present challenges for stakeholders across the board. The ECO is concerned that Regulation 903 is being used to address too many different issues, and the regulatory system created by Regulation 903 risks becoming unwieldy and unworkable. Further, without adequate resources devoted to wells and groundwater programs, including regular inspections and oversight, MOE will be unable to put the strengthened enforceability of the regulation into action.

The ECO is satisfied that the new disinfection requirements in the regulation are reasonable. The requirements for chlorination and subsequent testing of chlorine residuals, if followed, should ensure that a properly disinfected well is free of bacteriological contaminants. Well owners can submit samples of their well water for bacteriological testing by the province. The new disinfection requirements in Regulation 903 strike a balance between ensuring drinking water safety and creating a workable regulatory regime.

However, the ECO is disappointed that MOE failed to provide an explanation for its failure to address the Advisory Council's recommendation to require bacteriological testing as a final step in the disinfection process. Given the significant concern expressed by some commenters, and the Advisory Council's statement that the "overarching principle" of disinfection is that "water from private drinking water wells needs to be verified to be microbiologically safe, prior to human consumption," MOE should have included its rationale in the decision notice. The ECO is also concerned that MOE's statement in the *EBR* proposal notice that the amendments were developed to "respond to the recommendations of … the Advisory Council on Drinking Water Quality and Testing Standards" may have misled some members of the public into believing that MOE adopted all of the Advisory Council's recommendations.

The ECO urges MOE to continue to consider approaches and alternatives for continuing to improve the water well regulatory framework in Ontario and promote compliance with Regulation 903, and in so doing to continue to consult with and seek input from stakeholders and other professionals as early as possible in the process. The ECO also encourages MOE to continue working to establish regular inspection, enforcement and education programs to enhance the effectiveness of the wells regulation.

Review of Posted Decision:

4.9 The Water Taking Charge Regulation for Industrial and Commercial Water Users

Decision Information:

Registry Number: 010-0162	Comment Period: 62 days
Proposal Posted: April 3, 2007	Number of Comments: 45
Decision Posted: August 14, 2007	Comes into Force: August 10, 2007

Description

On June 4, 2007, the Ontario government passed legislative amendments to the *Ontario Water Resources Act* (*OWRA*), through the *Safeguarding and Sustaining Ontario's Water Act, 2007* (*SSOWA*). Among other changes, *SSOWA* introduced a new provision to the *OWRA* authorizing the provincial cabinet to establish, through regulations, a charge for the taking and use of water for commercial and industrial purposes. The purpose of such a charge must be "to promote the conservation, protection and management of Ontario's waters and their efficient and sustainable use," or to recover costs incurred by the Ontario government in administering the regulatory framework. (For information on *SSOWA*, please see the decision review in section 4.2 of this Supplement).

Accordingly, on August 10, 2007, the Ontario government filed a new regulation under the *OWRA* – O. Reg. 450/07, Charges for Industrial and Commercial Water Users – which establishes a regulatory charge for commercial and industrial water users.

Background:
Water takings in Ontario are governed by the *OWRA* and the Water Taking Regulation (O. Reg. 387/04). Under the *OWRA*, all persons in Ontario taking more than 50,000 litres of water per day (with some exceptions for domestic, agricultural and safety purposes) are required to obtain a Permit to Take Water (PTTW) from the Ministry of the Environment (MOE). In determining whether to issue or renew a PTTW to an applicant, MOE Directors are required to consider a number of factors set out in the Water Taking Regulation intended to ensure the conservation, protection, and wise management of Ontario's waters.

There are currently about 6,600 PTTWs in Ontario, allowing permit holders to collectively take about 495 trillion litres of water every year (equivalent to the approximate volume of Lake Erie). The vast majority of water taken is returned to its source watershed. For example, the hydroelectric power sector, which uses 66 per cent of the total permitted volume of water to be taken, returns virtually all of the water to the source after the water has run through the turbines to produce electricity. Similarly, Ontario's nuclear and fossil fuel power generation facilities, which collectively take 20 per cent of the total permitted volume of water, return the majority of the water they use to the watershed, although the water is typically returned at a different temperature.

Other water takers in the commercial and industrial sector (i.e., water takers that are not power generators) account for approximately two per cent of the total permitted volume of water to be taken. The remaining 12 per cent of permitted water takings are for agricultural, municipal, institutional or other uses (e.g., environmental remediation, dewatering, etc.).

Prior to O. Reg. 450/07, there was no general charge associated with the taking of water in Ontario (or with the broader costs of water management programs) – with one exception. Under the *Electricity Act, 1998*, most hydropower producers are required to pay a water rental charge to Ontario's Ministry of Finance for their use of water. This charge is not related to the PTTW regime.

In addition, since April 2005, most applicants seeking a PTTW are charged an administrative fee (ranging from $750-$3,000) that is levied strictly to cover MOE's direct costs of reviewing and processing the permit application. This administrative fee is not a water taking charge.

Purpose of the New Water Taking Charge:
The new water taking charge is characterized as a "regulatory charge" for water takings, not a royalty or tax. A regulatory charge is a fee that may be imposed for the purpose of defraying the costs of a regulatory scheme and/or furthering the goals of the regulatory regime by influencing behaviour in a manner consistent with the goals of the program (such as encouraging water conservation).

Ontario Reg. 450/07 states that the purpose of the water taking charge is to recover a portion of the costs that the province incurs in administering water management programs. Currently, the costs of Ontario's water management programs are covered by general tax revenues. The costs associated with gathering necessary information and managing water effectively and sustainably – so that adequate water resources are available to meet both current and future human and ecological needs – are substantial. In addition, as the demand for water is increasing in Ontario, the need to manage water sustainably and the costs associated with these management efforts are also increasing.

Many commercial and industrial water users benefit from the province's water management programs by being able to make informed business decisions based on their confidence in a secure water supply. MOE states that the new water taking charges are intended to ensure that those who create the need for, and commercially benefit from, the ministry's water management programs, contribute to the costs of delivering these programs. As such, the new water taking charge reflects a partial user-pay system where those who benefit from the programs help pay for them.

During the proposal stage for this regulation, MOE stated that a secondary purpose of the charge would be to promote more efficient water use by providing a financial incentive to regulated users. However, this secondary purpose is no longer reflected in the final regulation (or in the ministry's decision notice). While it appears that encouraging water conservation is not one of the formal purposes of O. Reg. 450/07, MOE has suggested that the regulation "could lead to a reduction in water use among those being charged."

Who is Being Charged:
Pursuant to the *OWRA* amendments, the water taking charges can only apply to water takings for commercial and industrial purposes. The *OWRA* does not allow charges to be levied for domestic, institutional, or environmental remediation purposes.

Within those limitations, O. Reg. 450/07 sets out which of the commercial and industrial water-users are subject to the new water taking charges. At present, in "phase one", the new water taking charges apply only to commercial and industrial facilities that:

a) withdraw water directly from a water source in accordance with a PTTW, or take more than 50,000 litres of water on any single day in a year from a municipal water supply; and

b) fall into one of the following classes of industrial and commercial facilities that incorporate water into their product:
   - facilities that manufacture or produce bottled water or water in other containers;
   - beverage manufacturing facilities;
   - fruit and vegetable canning or pickling facilities;
   - ready-mix concrete manufacturing facilities;
   - non-metallic mineral product manufacturing facilities;
   - pesticide, fertilizer and other agricultural chemical manufacturing facilities; and
   - inorganic chemical manufacturing facilities.

MOE has stated that it chose to charge these specified classes of commercial and industrial facilities first because they are all deemed to be highly consumptive water users. MOE classifies highly consumptive uses as uses where a significant portion (about 30-100 per cent) of the water withdrawn or withheld from the watershed is not directly returned to the watershed due to incorporation of the water into products, high evaporation rates, or other causes.

MOE states that consumptive uses, by removing water from the watershed, have a greater long-term impact on the watershed than non-consumptive uses, and create the greatest need for provincial water management programs. In addition, these "phase one" commercial and industrial facilities all use water to produce private financial benefits through the sale of products or services derived from water. For these reasons, the government has determined that these users should be the first phase of users required to contribute directly to the costs of managing Ontario's water resources.

In the proposal document for this regulation, the government stated that it intends to charge some of the other industrial and commercial users (possibly including the mining, pulp and paper, non-hydroelectric power and recreational sectors) in a subsequent phase, although no plans for a next phase have yet been announced. Since later phases would be implemented through amendments to O. Reg. 450/07, MOE would be required to consult again under the *EBR* before the proposed amendments were implemented.

Amount of Charge:
Starting on January 1, 2009, all "phase one industrial or commercial water users" will be required to pay $3.71 per million litres of water taken annually. The charge is based on the actual volume of water withdrawn (as reported by the facility to the ministry), and not the permitted volume (which is typically higher).

MOE has stated that when new sectors are phased-in at a later stage, different charge rates will apply to the various sectors. These charge rates will reflect each sector's share of the total program costs, based on the sector's overall consumptive volumes. The "phase one" users, which are considered by MOE to be the highest consumptive users, will pay a higher rate and a greater proportion of the water management costs than the other, less consumptive users. MOE has stated that the revenue collected from each sector is intended to cover only that sector's share of the province's water management costs, and not the costs of programs associated with other sectors not being charged.

Reviews and Reports by Ministry:
Ontario Reg. 450/07 requires the ministry to conduct a periodic review of the appropriateness of the amount of the charge to ensure that the water taking charge rates truly reflect program costs. In assessing whether the existing charge amount is appropriate, the ministry must consider:

a) the costs of administering the water management programs; and
b) the portion of those costs that are reasonably attributable to the phase one industrial or commercial water users.

The first review must be completed by December 31, 2012, and further reviews must then be conducted every five years. In spring 2008, the government had already suggested that a review of the charge rate was needed to examine "more appropriate" fees. The ministry is required to post a report of each of these reviews on the Environmental Registry.

Implications of the Decision

Regulation Introduces a Partial Cost Recovery System:
Currently, the government finances – out of general tax revenues – a large number of water management programs intended to protect Ontario's water resources. These programs include information-gathering programs (e.g., water quantity monitoring and water budget development), programs that regulate water withdrawals, and programs that support government partners (such as conservation authorities) in undertaking water research and management measures. Each of these programs requires financing to cover a variety of costs, including staff wages, field work, equipment, educational materials, and data management.

Ontario Reg. 450/07 introduces a partial user-pay system for provincial water management. The regulation now requires some water users that MOE deems to have the greatest impact on the watershed (because of their consumptive nature) to contribute to the costs of the water management programs that they create the need for and from which they benefit. However, the minimal revenue that is expected to be generated from the "phase one" users (estimated to be about $18 million) is likely intended to cover only a small portion of the province's total costs for it water management programs. Informal estimates from MOE suggest that the government spends just $25 million annually on Ontario's water quantity management programs related to the phase one users. While MOE has not provided an accounting of government water-related costs, a $25 million expenditure estimate seems very low to the ECO.

Water Taking Charges are Unlikely to Provide Environmental Benefits:
According to MOE, implementing volume-based water charges could encourage conservation and efficient water use by companies that are able to adjust their processes at a low cost. However, given the very low charge rate and the small number of water users being charged, it is very unlikely that the new water taking charge will have any significant effect on water conservation or efficiency. Moreover the charges are initially being applied to consumptive users who incorporate water into products, and thus, who have little ability to reduce water consumption other than by decreasing production and sales.

In addition, there is no indication that the revenue generated from the charge will result in additional or better water management programs; rather, it appears that the new revenue will simply displace some of the financing that currently comes from the government's general tax revenues.

Water Taking Charges are Unlikely to Result in any Financial Hardship:
One of MOE's stated objectives was to ensure that the amount charged would be affordable, and that it would not impose a significant financial burden on affected companies. The ministry's own economic analysis of the water taking charge indicates that the charge will cause a negligible increase in the operating expenses for affected companies.

Indeed, the charge rate of $3.71 per million litres of water is quite affordable. A company taking one billion litres of water per year will owe the province $3,710 for its annual water taking charge. By comparison, an equivalent taking of treated water from the City of Toronto's municipal supply would cost (at the going rate of $1,530/million litres) about $1,530,000 per year.

Public Participation & *EBR* Process

In 2004, MOE consulted broadly with stakeholders on the guiding principles and design of a water taking charge. Feedback from those consultations was used to develop the legislative framework for the water taking charges proposal.

In April 2007, the ministry posted a proposal notice for the proposed regulation (then called the "Water Conservation Charge Regulation") on the Registry. This proposal notice invited input from stakeholders on the details of the proposed charge (i.e., who the charge will apply to, the rate of the charge, etc.). Details of the proposal were set out in a thorough supporting document, entitled the "Water Conservation Charges Proposal Document", which was included in the proposal notice. MOE provided a 62-day comment period. Concurrent with the Registry posting, the ministry also met with stakeholder groups in Toronto for focused discussions about the proposed charge.

Summary of Comments:
In response to the Registry proposal notice, the ministry received 45 comments from the public. The commenters were primarily industry associations, municipal associations, environmental groups and conservation authorities. Most commenters, while not necessarily opposed to the charge, expressed concerns with at least some elements of the proposed regulation. A few industrial commenters, however, did not support the charge at all. For example, one industry association stated that they did not agree with a user-pay charge as it would add unnecessary additional financial and administrative burdens. They also stated: "Commercial and industrial users that receive a benefit from withdrawing water already share their benefit with the government through the tax system."

Identifying Sectors that should be Subject to the Water Taking Charge:
Many commenters expressed a strong desire that the charge apply to all water users, with no exemptions. These comments were made exclusively by industry groups that, not surprisingly, fell within the "'phase one" sectors, as well as a few environmental groups.

Most of these industrial commenters argued that it is unfair to require only some water takers to pay the water taking charges. They stated that it is unreasonable to require a small portion of the province's water takers to bear a disproportionate share of the province's water management costs. These commenters also expressed concern that their payments would cross-subsidize other non-paying water users. One commenter argued that if the revenue from their charges does, in fact, go beyond defraying the costs of regulating the "phase one" sectors, the charge would fail to satisfy the requirements of a "regulatory charge", and could be considered an invalid tax.

A few of these industrial commenters argued that all water takings – regardless of whether the water is used in irrigation, cooling, drinking, washing, etc. – are consumptive by nature and have an impact on the quantity of a water resource. Accordingly, they argued that new water charges should be applied consistently to all uses, at one uniform rate, and at the same time (i.e., not phased-in) "to avoid the arbitrariness and ensure a level playing field for all water users in Ontario." Another commenter observed that the ministry's decision to exclude certain sectors is inconsistent with the government's fundamental objective of encouraging the conservation, protection and sustainable use of water.

Conversely, other industrial commenters (i.e., those industries that do not fall within the highly-consumptive "phase one" sectors) argued that the province should only charge water takers that consume (or divert) large quantities of water from the watershed; non-consumptive users should never be charged. These commenters argued that it would be unfair to charge users that only take water temporarily (for example, for cooling purposes) and return the vast majority of the water to the source unimpaired, as such users are not creating a need for provincial water management programs.

A few other commenters suggested that if the ministry does proceed with the "consumptive use" approach, the proposed list of highly-consumptive users is incomplete. Two municipal works associations argued that golf course watering, mining, and nuclear and fossil fuel power production should all be included in "phase one" as these are all highly-consumptive uses. Conversely, a golf association argued that water for irrigation of golf courses should be exempt from the charge as golf courses provide broad public and environmental benefit, stating that they "object in principle to the charging of a fee for irrigation of a facility that provides social, cultural and environmental benefits."

Calculating the Charge Rate Based on Level of Consumption:
Several industrial commenters (particularly those with low consumption rates) argued that the rate of the charge should be based only on the portion of water consumed, and not on the total amount of water withdrawn. They argued that the intent of the regulation should be to discourage water uses that deplete the water source; if water takers do not consume or divert water, they should not be charged.

A few commenters stated that, by charging for water withdrawn rather than water consumed, the regulation provides no incentive or reward for using water more efficiently and returning more water to the source (through efforts such as water recycling). These commenters argued that a charge for water consumption (rather than water withdrawal) would do more to promote water conservation initiatives.

Other commenters suggested that the "consumptive use" categorization oversimplifies the complex impacts of water takings. Many commenters – including environmental groups, municipal associations, and industrial groups – suggested that consumption should not be the only factor considered. These groups recommended that the charge rates should also be based on:

- the sensitivity of the source water (or point of extraction); and
- the quality of the water returned after use (considering, for example, the introduction of contaminants, changes in temperature, etc.).

An industry association noted that, because the charge rate does not consider the source of the water, the same rate will apply to water withdrawn from a fresh water source as from a storm water management facility. This commenter encouraged the government to consider the source of water in the charge rate as another means of creating a financial incentive to promote internal recycling systems.

Magnitude of Charge is Too Low to Encourage Conservation:
A number of commenters – including environmental groups, municipalities and conservation authorities – commented that the rate of the charge is far too low to achieve the ministry's stated objective of encouraging water conservation practices. One commenter stated, in reference to the fact that the charge was called the "water conservation charge" in the proposal document, that the province should either "call the proposal what it is, or make it what it calls it." It appears that the government chose to change the name of the charge to better reflect its objective.

The Need for Transparency:
Many commenters noted that the government failed to provide any rationale for the amount of the charge. These groups commented on the need for MOE to provide detailed information to the public regarding:

- which water management programs (including those of government partners) are included in the list of programs to be funded by these charges;
- the amount that the province currently spends (or projects to spend) on each of these programs;
- the expected amount of revenue to be generated from the water taking charge; and
- the estimated percentage of the program costs that will be covered by the new charge.

Many of the industrial commenters stated that this level of transparency is required to ensure open accountability and to ensure that the charge remains defensible as a "regulatory charge". These commenters stated that detailed information will also be needed during future reviews of the charge so that the public can verify that any proposed increases in the charge rates are fair. Many of the commenters expressed serious concerns that the fees could escalate rapidly during future reviews of the charge. Without full disclosure from the ministry of both the program costs and the revenues, there would be no cost control by industry. One industry group suggested that any new water management program to be covered by the charge (by either the ministry or its partners) should be posted on the Registry during the proposal stage, along with the estimated costs, for public review and comment.

Programs Covered by the Water Taking Charge Revenue:
A few commenters suggested that the proceeds from the water taking charge should be put in a dedicated account for water management programs. Several conservation authorities suggested that a percentage of the charge revenue should be provided to the conservation authorities and other agencies involved in the PTTW review process to offset their cost associated with those reviews. Similarly, two municipalities suggested that a portion of the revenues should be forwarded to municipalities to offset their costs for dealing with water issues.

Consideration of Comments:
The government appears to have considered the comments and did make a few amendments in response. Most notably, the government removed the word "conservation" from the name of the charge, as well as placed less emphasis on the conservation objective in the final regulation. However, the ministry did not provide any explanation of this change in the Registry decision notice.

SEV

MOE provided a brief statement asserting that the water taking charge will contribute to MOE's commitment to environmental protection. MOE stated that the charge will be used to defray the costs of water management programs that help ensure a clean, healthy environment, and protect Ontario's rich water resources. MOE stated that "Ontario's water resources would be protected by making users pay their share toward the costs of sustaining them for future generations." However, MOE did not explain if the charge will result in increased or improved water management programs. It is unclear how the government draws the connection that the user-pay charge will help better protect Ontario's water resources. MOE also stated that the volume-based water taking charge "could lead to a reduction in water use among those being charged," and thus will contribute to MOE's commitment towards resource conservation.

Other Information

On the same day that the government filed O. Reg. 450/07, it also filed amendments to O. Reg. 387/04 – the Water Taking Regulation – under the *OWRA*. These amendments to O. Reg. 387/04 require that the highly consumptive commercial and industrial water takers that have previously been "grandfathered" (because they began their water takings prior to March 30, 1961) must now apply for a PTTW by June 30, 2008. This amendment was made to provide fairness and equality by ensuring that all similar water takers will be subject to the charge. The ECO supports this amendment.

ECO Comment

The purpose of O. Reg. 450/07 is purely one of partial cost-recovery – i.e., to defray some of the government's costs of managing the province's water resources. The ECO fully supports this purpose, as well as the underlying principle that users should pay for the services for which they create a need and from which they benefit. However, the ECO believes that this regulation should have gone much further.

The new water taking charge, as established, will not meaningfully "promote the conservation, protection or wise management of Ontario's waters", despite the fact that this purpose is explicitly authorized by the enabling provision in the *OWRA* for the water taking regulation. The charge rate of $3.71 per million litres of water is far too low to create any meaningful economic incentive for conservation. Furthermore, the new water taking charge is unlikely to result in any new or improved water management programs. It appears more likely that the new source of revenue from the charge will simply offset other program funding from the government's consolidated revenue fund.

In addition, the application of the charge to so few water takers will limit any potential benefits from the charge. While it is reasonable to phase-in the charge, the ECO notes that many sectors that were not included in phase one – including both consumptive and non-consumptive users – have a significant impact on the province's water resources. The ECO hopes that, in future phases, MOE takes a broader approach in considering which sectors should be included in the regulation.

As a number of commenters noted, MOE did not provide sufficient information regarding the expected total revenue from the charge, the programs to be covered by this charge, or the approximate cost of the province's relevant water management programs. While these numbers are not published, the very low informal estimates from MOE regarding the government's spending on provincial water quantity management programs for phase one users (i.e., $25 million) suggest that the scope of water management programs currently being included in this regulatory framework is far too narrow.

The ECO strongly urges MOE, during the first and future reviews of the charge, to provide a transparent explanation of the proposed charge amount, including a list of the programs covered, the approximate costs of these programs, and the revenue generated from the charge. The ECO further encourages MOE to substantially expand the scope of the water management programs covered by the charge. The water taking fees should reflect the proportionate costs of what the government truly is (or *should be*) spending on water quantity management programs in relation to the charged sectors (including the costs of programs operated by partners, such as the conservation authorities). A water taking charge that is both substantial and proportionate to the costs relating to the charged sectors should help encourage water conservation, while still satisfying the definition of a regulatory charge.

Going forward, the ECO strongly encourages the development of a more substantial and comprehensive water taking charge. Nevertheless, the system for allocating water taking permits must continue to be science-based (applying the criteria in O. Reg. 387/04 and the PTTW Manual, which require MOE directors to consider factors such as water quantity, water quality, water availability, environmental features, water conservation programs, and the purpose of the proposed water taking), rather than based on a capacity to pay, to ensure that ecosystem protection and the public interest continue to be paramount.

Review of Posted Decision:

4.10 On-farm Treatment Technologies – Anaerobic Digesters and Vegetative Filter Strips

Decision Information:

Registry Number: 010-0184
Proposal Posted: April 2, 2007
Decision Posted: July 30, 2007
Comment Period: 30 days
Number of Comments: 24
Came into Force: July 26, 2007

Description

In July 2007, the Ontario government amended O. Reg. 267/03 under the *Nutrient Management Act* (*NMA*) to encourage livestock farmers to use anaerobic digesters to treat manure and other organic wastes; produce energy and reduce greenhouse gas emissions, and to use vegetative filter strip systems to treat runoff contaminated with manure to improve water quality. Ontario Reg. 267/03, which is still being phased-in, sets out requirements for the management of nutrients from a variety of sources including manure and sewage biosolids that are applied to agricultural land for the purpose of enhancing crop growth. The amendments to O. Reg. 267/03 describe the approval, design and operating requirements for these two optional on-farm treatment options. The Ministries of the Environment and Agriculture, Food and Rural Affairs (MOE and OMAFRA) are promoting both options as environmentally safe and innovative approaches to reduce the risk of adverse effects of agricultural activities on the environment.

Anaerobic digesters (ADs) can be used to treat manure and other organic waste materials to produce biogas and a liquid/solid output. Biogas contains approximately 60 per cent methane, a powerful greenhouse gas. Biogas can be released to air or used as a source of renewable energy. It can be used to heat buildings or fed into natural gas lines, or to produce electricity to be used on-site or added to the power grid. When biogas is used as a source of renewable energy instead of being released to the air, greenhouse gas emissions are reduced. ADs may also have lower greenhouse gas emissions in comparison to conventional methods of managing manure.

The liquid/solid output from the AD contains the nutrient content of the organic materials that were fed into the AD and can be applied to land to enhance plant growth. AD output has fewer pathogens and less odour than manure, hence the risk of local waterbodies becoming contaminated and of odour complaints is reduced, which is another advantage of this technology.

The amendments to O. Reg. 267/03 include several new terms that are key to understanding the AD provisions. The term "on-farm anaerobic digestion materials" refers to organic wastes such as manure, livestock bedding, runoff from yards contaminated with manure and crop wastes that are generated by an agricultural operation, which includes aquacultural, horticultural and silvicultural operations. The term "off-farm anaerobic digestion materials" refers to organic wastes such as wastes derived from the processing of cash crops and energy crops, or generated by food processors, wineries and breweries that are not generated by an agricultural operation. Schedules 1 and 2 of the regulation list the off-farm AD materials that can be treated in ADs regulated under O. Reg. 267/03. Municipal sewage and pulp and paper biosolids are not on the list of allowable off-farm AD materials. Mixed ADs are defined in O. Reg. 267/03 as those ADs that treat both on-farm and off-farm AD materials, and "regulated mixed" describes ADs that are mixed ADs that comply with O. Reg. 267/03. Lastly, liquid/solid AD output under certain conditions is another source of plant nutrients that has been categorized as "agricultural source materials." Manure and runoff contaminated with manure are also examples of agricultural source materials.

Prior to this decision, livestock farmers that installed mixed ADs were regulated as waste facilities and required to obtain a Certificate of Approval (C of A) (Waste) under the *Environmental Protection Act* (*EPA*). With these amendments, Cs of A (Waste) are not required for regulated mixed ADs. In addition, the trucks that deliver off-farm AD materials to be treated in mixed ADs are no longer required to have Cs of A (Waste Management) under the *EPA*. Certificates of Approval (Waste) under the *EPA* continue to be required for on-farm mixed ADs that exceed the size limitations or do not comply with other requirements in O. Reg. 267/03. Similarly, Cs of A (Waste Management) are still required for the trucks that deliver off-farm materials if certain requirements are not met. On-farm mixed ADs that treat only agricultural source materials continue to be exempt from approval requirements under the *EPA* and are not subject to most AD requirements in O. Reg. 267/03.

Vegetative filter strip systems (VFSSs) are an approach that livestock farms can use to manage runoff contaminated with manure before it reaches a waterbody. VFSSs are designed by professional engineers and constructed to intercept and treat runoff from outdoor livestock yards and solid manure storage facilities. VFSSs use processes that promote the "settling, filtration, dilution, adsorption of pollutants and infiltration into the soil." VFSS components collect and store runoff, screen runoff to remove coarse material, and are designed to distribute runoff evenly across a vegetated strip. VFSSs can also be used to treat mixed AD output.

VFSSs have been regulated as sewage works under the *Ontario Water Resources Act* (*OWRA*) since January 2006. Livestock farmers that installed VFSSs were required to obtain Cs of A (Sewage Works) under section 53 of the *OWRA*. Guidance on how to design VFSSs was provided by OMAFRA in its "Vegetated Filter Strip System Design Manual." According to the manual, the objective of a VFSS is to treat runoff contaminated with manure without discharging any contaminated runoff to surface water or contaminating ground water. The manual explains that the guidance it provides is not intended to treat washwater nor runoff from roofs. The amendments to the *OWRA* exempt livestock farmers from having to obtain Cs of A (Sewage Works) for VFSSs if they comply with O. Reg. 267/03.

Although very small livestock farms that generate five or fewer nutrient units such as a farm that has five or fewer Jersey milking cows, are not subject to most requirements in O. Reg. 267/03. Instead, they are subject to the requirements for VFSSs and some of the requirements related to land application of mixed AD output.

The Nutrient Management and Sampling and Analysis Protocols that are part of O. Reg. 267/03 were updated to reflect the amendments and were re-published on July 20, 2007.

Background:
Ontario Reg. 267/03 classifies materials containing nutrients, such as nitrogen, phosphorus and potassium, as being agricultural source materials or non-agricultural source materials. Agricultural source materials include manure and runoff contaminated with manure, and non-agricultural source materials include sewage biosolids and pulp and paper biosolids. Currently large municipal sewage treatment plants and some livestock farms are phased-in under the regulation and are required to prepare nutrient management strategies (NMSs) that include information on the types, volumes and quality of nutrients that they generate. Phased-in livestock farms that also apply nutrients to land and any livestock farms that apply non-agricultural source nutrients to land are required to prepare nutrient management plans (NMPs) that include information on the types and volumes of nutrients to be applied, and on their application practices. Ontario Reg. 267/03 also sets out requirements for vegetative buffer zones that, like VFSSs, can prevent nutrients applied to farm fields from entering surface waters. For additional information on nutrient management, refer to the Supplement to the ECO's 2003-2004 Annual Report, pages 49-61.

Under the Renewable Energy Standard Offer Program (RESOP) announced by the Ministry of Energy on March 21, 2006, the government will pay small facilities including livestock farmers a fixed price for electricity generated from renewable energy sources, such as wind, water, solar and biogas. Manure is a good source of organic materials for biogas systems since it is consistent in quality and amount year-round. AD projects that qualify for RESOP may not be required to conduct environmental screenings and/or assessments under the *Environmental Assessment Act* due to an exemption for small electricity projects.

Anaerobic Digesters:
Anaerobic digesters are sealed, heated containers that break down, i.e., stabilize organic material using biological processes in the absence of oxygen. According to OMAFRA, the use of off-farm waste materials in on-farm mixed ADs produces a "more stabilized material with fewer pathogens and less odour" and can double energy production over ADs that only treat manure.

The reduction in pathogen content is dependent on several factors including the design, operating temperature, retention time and nature of the organic wastes fed into the digester. For instance, if the operating temperature of the AD is lowered to reduce operating costs, then the retention time must be increased to achieve the same reduction in pathogen content. In a recent study of two ADs in Oregon that were treating dairy manure, concentrations of *E.coli* were reduced by over 98 per cent. Since detectable levels of some other pathogens were still found in over 50 per cent of the samples, the authors concluded that pathogens in AD output could be transferred to other agricultural operations. For example, crop and/or animal pathogens could be transferred to horticultural operations, fruit and vegetable farmers, or other livestock farmers that used the AD output. Other researchers have concluded that AD output contains sufficient numbers of pathogenic bacteria to make it unsuitable for distribution or sale to the public but still acceptable for application to agricultural land. They noted that substantial reductions in pathogen content can be achieved if appropriate steps are taken, e.g., the use of high operating temperatures.

Livestock operations that plan to construct an on-farm regulated mixed AD will be required to prepare a NMS and submit it to OMAFRA for approval. The NMS must describe how the regulatory requirements for storage, management of AD output, etc., set out in O. Reg. 267/03 will be met. At a minimum, 75 per cent by volume of the source materials for the digester must be on-farm materials and 50 per cent by volume of the on-farm materials must be manure. Some of the on-farm materials must be generated on the livestock farm on which the digester is located. However, on-farm materials can also include organic wastes received from other livestock farms if the livestock on these farms and the host farm generate less than 1,000 nutrient units in total annually. (One thousand milking Jersey or 850 milking Guernsey cows generate 1,000 nutrient units.) The remaining 25 per cent can be off-farm materials. A maximum of 5,000 cubic metres of off-farm materials (including farm feed) can be received in a year, but no more than 100 cubic metres (not including farm feed) can be received/stored per day.

The amendments outline the receipt and storage requirements for off-farm AD materials to reduce the likelihood of runoff from storage piles and of unacceptable odours. Generators of off-farm AD materials are required to sample and test their materials to ensure that they comply with the metal limits defined in the regulation.

In addition, the amendments outline the requirements for the operation of regulated mixed ADs. In general, materials must be retained for at least 20 days and treated at a minimum temperature of at least 35°C. However, the operating temperature and retention time may be increased or decreased under specified conditions. The amendments require that all biogas be collected and a gas combustion system capable of consuming 110 per cent of the anticipated volume of biogas be installed. The amendments do not require that the biogas be used as a renewable energy source. Records must be kept including specifics of each delivery of off-farm AD materials, results of metal analyses and destinations of AD output.

When the amendments to O. Reg. 267/03 came into force, OMAFRA announced that it was providing $9 million (to a maximum of $400,000 for each AD) under the "Ontario Biogas Systems Financial Assistance Program" to farmers and agri-food businesses to develop and build AD systems. Livestock farmers that comply with the AD requirements in O. Reg. 267/03 are eligible for the funding. OMAFRA explained that a biogas system using manure of 250 cows could reduce greenhouse gas emissions by 400 tonnes and produce 550 megawatt-hours of power annually. In the Climate Change Action Plan released in August

2007, the Ontario government included the greenhouse gas reductions for 20-25 regulated mixed ADs. For additional information about the biogas program, refer to the OMAFRA website.

Vegetative Filter Strip Systems:
The amendments to O. Reg. 267/03 set out the criteria for siting VFSSs, including setbacks from wells and tile drainage and depths to bedrock and aquifers. The amendments also outline overall design and operational standards, and record-keeping requirements for the establishment, alteration, expansion and operation of VFSSs. VFSSs regulated under O. Reg. 267/03 are not required to comply with the requirements in the VFSS Design Manual. VFSSs regulated under the *OWRA* are not subject to the VFSS requirements in O. Reg. 267/03, but are required to comply with the requirements in the VFSS Design Manual (if included as a condition in their Cs of A (Sewage Works)).

Implications of the Decision

Although ADs can be costly to install, they offer numerous benefits to the agricultural community and to Ontarians in general. The agricultural community benefits since:

- AD output contains nutrients that can be used in place of manure and commercial fertilizers.
- AD output that has lower pathogen content and less odour than manure and is land-applied may be more acceptable to the public.
- AD output has lower weed seed content than manure and when land applied should produce crops with fewer weeds, resulting in better prices and less use of herbicides.
- Livestock operations can save on heating and energy costs and earn income from the sale of energy produced from the biogas.

Ontarians also benefit since:

- The risk of adverse environmental effects from agricultural activities should be reduced.
- The risk of adverse odours and concerns about land application of manure should be reduced particularly in areas where residential development occurs in close proximity to agricultural operations.
- ADs increase the province's capacity to treat certain off-farm organic wastes thereby potentially reducing the need to build new facilities.
- Biogas that is used as an energy source reduces our dependence on non-renewable sources of energy, such as coal, nuclear energy and fossil fuels, and reduces the production of greenhouse gases that contribute to global warming (in comparison to AD systems that release/flare biogas.)

Over the last couple of years the Ontario government has taken several steps to encourage the adoption of AD technologies, which are much more common in Europe and Asia. Germany, for instance, has about 2,700 farm-based ADs that produce about 650 MW electric power annually. The Ontario government hopes that by simplifying the approval process, and providing greater assurance of success and economic viability AD technologies will be adopted. For instance:

- Since only a few farmers could justify the cost of implementing an AD for processing agricultural wastes, several funding programs, such as RESOP and the Ontario Biogas Systems Financial Assistance Program, are now available to assist farmers with some of the costs.
- Early implementations of ADs in North America often failed. Since design and operating standards have been outlined in O. Reg. 267/03, there is greater assurance of success.
- Since the process to approve the receipt of off-farm organic wastes for anaerobic digestion was complex and lengthy, the amendments to O. Reg. 267/03 are intended to simplify the approval requirements for ADs that accept off-farm wastes by exempting them from having to obtain Cs of A.
- Lastly, since opportunities to supply energy to the province for revenue were limited, the government streamlined the approval process for small electricity generators and provided greater economic certainty for renewable energy projects via RESOP.

Lost Opportunities for Public Comment:
When applications for approvals for VFSSs and ADs are required under the *OWRA* and *EPA* respectively, they are subject to the public notice and comment requirements of the *EBR*. However, when ADs and VFSSs are regulated under the *NMA*, the public is not notified of nor provided with an opportunity to comment on proposals for these technologies. The ECO has encouraged MOE and OMAFRA to prescribe these instruments under the *EBR*.

This decision reflects a fundamental shift in how these treatment technologies are regulated when they are used by the agricultural community. Under the *OWRA*, VFSSs are viewed as sewage works, i.e., requiring the same type of approval as a municipal or industrial sewage treatment facility or for stormwater treatment. Under the *NMA*, VFSSs are viewed as a way to manage nutrients. Similarly, under the *EPA*, ADs are viewed as waste management systems, i.e., requiring the same type of approvals as a landfill site or incinerator. Under the *NMA*, ADs are viewed as a way to manage nutrients. This shift in perspective extends to the management, design and operational requirements of these technologies. For instance, when the ECO compared a C of A (sewage works) under the *OWRA* to the *NMA* rules for a VFSS on a farm, the ECO found that the general requirements were the same as in O. Reg. 267/03. However, the C of A (Sewage Works) required compliance with the VFSS Design Manual, which has considerably more detail about design considerations than are found in O. Reg. 267/03. In addition, the Cs of A (Waste) for two ADs on livestock farms that the ECO reviewed include requirements related to financial assurance, signage, rejected and residual waste handling, truck traffic, noise, litter, vermin, hours of operation, spill prevention and containment, and complaint handling. Approvals for ADs on farms subject to O. Reg. 267/03 have few, if any, requirements related to those items. Instead, O. Reg. 267/03 includes requirements related to land application of AD output that are not in Cs of A (Waste).

Although the *NMA* and its regulation do not prevent livestock farmers from selling AD output to be applied to lawns, gardens, golf courses, etc., MOE advised the ECO that this scenario is unlikely since AD output saves farmers from having to buy more expensive fertilizer products.

Public Participation & *EBR* Process

A plain language proposal was posted on the Registry for a 30-day comment period. Thirteen written and 11 online comments were received.

Anaerobic Digestion:
The Composting Council of Canada (CCC) and other stakeholders in the composting industry, including, All Treat Farms Limited, Miller Waste Systems, City of Peterborough and Niagara Region, commented that the proposal creates an unfair regulatory framework in Ontario since some ADs would be regulated under the *EPA* and others under the *NMA*. The Association of Municipal Recycling Coordinators (AMRC) recommended that all organics processing sites be regulated under the *NMA*; whereas, Lemieux Composting recommended the *EPA*. All Treat Farms Limited warned that the lack of rules for on-farm operations will result in problems that the farming industry does not have the expertise to resolve. In a separate submission to the Ministers of MOE and OMAFRA, the CCC warned the government against proceeding with this decision "without having an overall vision for organics recovery." Some commenters were concerned that this proposal will divert, sometimes limit, feedstocks from existing composting facilities and negatively impact the growth of the composting industry. Several commenters recommended that MOE conduct an economic analysis of the proposal, and some noted that MOE and OMAFRA failed to consult with existing composting facilities prior to making this proposal.

The AgriEnergy Producers' Association of Eastern Ontario (APAEO) commented that on-farm biogas systems that use only manure as their feedstock are economically feasible only on farms with 160 or more cows. Since about 95 per cent of Ontario's 7,700 dairy farms have fewer than 160 cows and about 70 per cent of dairy farms have 4 - 84 cows, APAEO noted that other approaches are required to make biogas systems economical for the vast majority of dairy farms in Ontario. One such approach would be to allow the use of off-farm organic wastes, such as food scraps, fats, oils, greases, energy crops and silage, which can "dramatically" improve the operating efficiency and output of on-farm biogas systems.

According to the APAEO, one ton of food waste, which is one of the largest sources of alternative feedstock available, is capable of producing the equivalent of 250-500 kWh of electricity. APAEO noted that Europe has allowed food waste in ADs for decades. APAEO also noted that limiting off-farm material to 25 per cent discriminates against the "largest proportion of farms in Ontario" since they won't have enough manure to install an economically viable biogas system.

The Association of Professional Engineers of Ontario, whose members will be required to design the anaerobic digestion systems, expressed concern that the requirements related to storage, structure, siting and treatment for minimizing odour emissions were too vague and will cause "irresolvable disputes." It recommended that MOE identify recognized best practices that can be followed to minimize odour emissions. A second commenter advised that aerobic composting facilities have a "lengthy and ongoing history" of producing unacceptable odour emissions, which can be confined and controlled through the use of anaerobic closed technologies.

Canadian Environmental Law Association (CELA) and Sierra Legal Defence Fund (SLDF, now called EcoJustice) in a joint submission expressed concern that the proposal will lessen public, environmental and legal scrutiny in comparison to ADs regulated under the *EPA*. Regulatory oversight, and therefore compliance and enforcement of standards, they noted, is being removed and applications for Cs of A will no longer be posted on the Registry for a 30-day comment period. They also noted that the proposal failed to explain how the threat/risk to water sources/drinking water will be reduced. CELA and SLDF recommended that all generated biogas be managed to ensure that the facilities are carbon-neutral.

As a result of the comments, MOE made several changes to the proposal. For instance, to alleviate some of the concerns of the composting industry, MOE removed leaf and yard waste, raw sawdust and raw wood chips from the list of materials "allowed" in ADs regulated under O. Reg. 267/03. MOE explained that source-separated household organic waste (green bin waste) and some other food waste were already not allowed due to their potential for producing unacceptable odours. Changes were also made to the operating temperature rules "to allow for greater [processing] flexibility." MOE advised that further guidance on minimizing odours and "managing non-combusted biogas in a safe manner" will be developed and posted on OMAFRA's website. *(Note: as of May 20, 2008, OMAFRA had not published anything.)*

Vegetative Filter Strip Systems:
In their joint submission, CELA and SLDF indicated that their concerns about ADs also applied to the proposal for VFSSs. MOE did not respond to these concerns.

SEV

In its SEV considerations briefing note, MOE explained that it considered the potential "cumulative effects that agriculture can have on the environment" when it drafted the rules for mixed ADs and VFSSs. MOE stated that it took an ecosystem approach by considering the "interrelations between land, water, air and living organisms." According to MOE, the amendments minimize the potential negative impacts of manure on water quality and living organisms, and will benefit Ontario. MOE also explained that its priority was to protect the environment by supporting technologies that reduce pathogens in nutrient materials that will eventually be applied to land. According to MOE, anaerobic digestion promotes resource conservation since biogas can be used instead of conventional fuels or be used to produce electricity that can be sold to the electrical grid. VFSSs also promote resource conservation by conserving water.

Other Information

Adoption of AD technologies to stabilize manure and produce energy has grown steadily in the U.S. since 2000. The U.S. Environmental Protection Agency (EPA) estimated that in 2007 approximately 111 ADs produced an estimated 215 million kilowatt-hours equivalent of useable energy. Around 80 per cent of the ADs have been installed by the dairy industry. The U.S. EPA cited five reasons for the growth: (1) improved AD design and reliability; (2) reduction in odour and environmental impacts of manure; (3)

increased governmental cost-sharing programs; (4) increased interest by utilities in renewable energy; and (5) income from the potential sale of carbon credits.

In a report completed before these amendments were made, the Hastings Stewardship Council and Eastern Lake Ontario Regional Innovation Network estimated that a livestock operation would need to have at least 300 cattle (about 300 – 428 nutrient units) in order for an on-farm AD to be economically feasible. They suggested that dairy farmers form co-operatives to improve the economic viability of the technology. They noted several potential advantages not mentioned above including reduced handling of manure, fewer flies, and revenue from tipping fees for off-farm wastes and selling the nutrients to the public, nurseries and cash croppers.

The Minimum Distance Separation Formulae apply to on-farm ADs that accept off-farm wastes.

ECO Comment

The ECO is pleased that MOE and OMAFRA are promoting both of these technologies as they have the potential to provide superior treatment of manure. These technologies can reduce the risk of adverse environmental effects by agricultural activities, such as contamination of water bodies and odour. However, the flexibility in the minimum operating requirements does not ensure that benefits of AD technologies such as odour reduction and pathogen reduction will be maximized. In addition, O. Reg. 267/03 does not include requirements related to the handling of waste produced by a digester. Farmers will not have to register as generators of this waste, nor comply with the manifest requirements under the *EPA*. The ECO notes that OMAFRA has committed to providing guidance material related to minimizing odours and managing unused biogas, which if handled inappropriately would increase greenhouse gas emissions. The ECO will monitor this and provide an update in a future report.

This decision follows a pattern that has emerged since the enactment of the *NMA* – farm operations phased-in under the *NMA* are exempted from many of the environmental protection provisions in the *EPA* and *OWRA* with which other sectors are required to comply. Despite continuing concerns from the public and other stakeholders about uneven regulatory playing fields, MOE and OMAFRA continue to entrench this divide with one set of rules for agriculture and another for everyone else. It confuses the public and discourages stakeholders from working together, in this case, to create effective and efficient recycling of organic wastes. It also prevents the public from using the *EBR* to request investigations into potential instances of non-compliance with O. Reg. 267/03 because the *NMA* is not prescribed for *EBR* investigations. The ECO urges MOE and OMAFRA to engage the broader community by notifying the public of local nutrient management proposals related to ADs and providing opportunities to review and comment on these proposals.

Review of Posted Decision:

4.11 A Review of the Financial Plans Regulation under the *SDWA*

Decision Information:

Registry Number: 010-0490	Comment Period: 50 days
Proposal Posted: May 4, 2007	Number of Comments: 25
Decision Posted: August 16, 2007	Came into Force: August 14, 2007

Description

On August 14, 2007, the Ministry of the Environment (MOE) filed O. Reg. 453/07, the Financial Plans Regulation under the *Safe Drinking Water Act* (*SDWA*). This new regulation sets out the requirements for

Financial Plans, which municipal drinking-water systems must prepare as part of the requirement to obtain a Drinking Water Licence under the *SDWA*. MOE also published a guideline entitled "Toward Financially Sustainable Drinking-Water and Wastewater Systems," to support municipalities with the preparation of their Financial Plans.

Background:
Following the May 2000 contaminated water tragedy in Walkerton, Justice Dennis O'Connor released his Report of the Walkerton Inquiry, which set out strategies for preventing such a tragedy from reoccurring. Among the many recommendations made in his Report, Justice O'Connor recommended that the provincial government require all owners of municipal water systems to obtain a licence for the operation of their drinking-water systems. Justice O'Connor further recommended that the municipal owners be required to submit a financial plan as a condition of obtaining this licence.

Justice O'Connor explained that proper financial planning is a necessary component of providing safe drinking-water because it helps to ensure that drinking-water systems become self-financing and sustainable, and thus helps to ensure that systems have adequate funds to finance both ongoing operational costs and infrastructure repairs and upgrades as required. According to Justice O'Connor, sustainable financial planning entails two components: first, a "full-cost accounting" of the water system (including the long-term infrastructure needs) to determine the true cost of providing safe water; and second, a "full-cost recovery" plan to determine how the municipality will raise the funds necessary to cover the full costs.

The Municipal Drinking Water Licence Program under the SDWA:
In December 2002, in response to Justice O'Connor's recommendations, the Ontario government passed the *Safe Drinking Water Act*. The new *SDWA* included provisions enabling MOE to establish a new Municipal Drinking Water Licence Program to replace the existing Certificate of Approval process for municipal residential drinking-water systems. The *SDWA* provides that, in order for municipal drinking-water systems to obtain a Drinking Water Licence ("Licence"), every owner must have all of the following elements in place:

- a Permit to Take Water (as required by the *Ontario Water Resources Act*);
- a Drinking Water Works Permit (i.e., a permit to establish or alter a drinking-water system);
- an Operational Plan (that documents the operating authority's quality management system);
- an Accredited Operating Authority (i.e., proof that the body in charge of operating the drinking water system has been accredited by a third-party audit); and
- a Financial Plan.

Despite being introduced in 2002, these licensing provisions in the *SDWA* were not brought into force until May 2007, when the necessary supporting regulations and policies were finally developed. (See the section below entitled "Other Information" regarding the new supporting regulations and policies). The new licence program will be rolled out over several years, and MOE has stated that it will be completely in place by 2013.

The Sustainable Water and Sewage Systems Act, 2002:
In December 2002, in accordance with Justice O'Connor's recommendations, the Ontario government also passed the *Sustainable Water and Sewage Systems Act, 2002* (*SWSSA*). The *SWSSA* was introduced to address the financial sustainability of municipal water and wastewater systems in Ontario by requiring municipalities to:

a) prepare a full-cost accounting report that assesses the total cost of providing the municipal water and sewer services (including the operating, capital, financing and source protection costs); and
b) develop a cost recovery plan that indicates how they intend to recover the full amount of their costs.

Although the *SWSSA* received royal assent in 2002, no supporting regulations have ever been developed, and consequently this Act has never been proclaimed into force. If implemented, the *SWSSA* would require municipalities to prepare and approve their own full-cost accounting reports and cost recovery plans based on a written opinion by the municipal auditor, and to submit the full-cost accounting report to MOE for provincial approval. (For a review of the *SWSSA*, please see pages 105-107 of the ECO's 2002-2003 Annual Report.)

The Watertight Report:
With the *SWSSA* still unproclaimed, in August 2004, the Ministry of Public Infrastructure Renewal (PIR) commissioned the Water Strategy Expert Panel to determine the best way for Ontario's public water and wastewater systems to become financially sustainable and deliver safe, clean and affordable water and wastewater services. In July 2005, the Panel released its report entitled: "Watertight: The case for change in Ontario's water and wastewater sector".

Through its examination of Ontario's water infrastructure, the Panel found that many municipalities do not charge the full costs for their water and wastewater services, and that many have been under-investing in their water systems for the past thirty years. As a result of this neglect, combined with projected population and economic growth, PIR estimated (in 2005) that the backlog of repairs and replacement of Ontario's water and wastewater infrastructure was about $34 billion.

Therefore, to ensure the safety, affordability and long-term financial sustainability of Ontario's water and wastewater systems in the future, the Panel made a large number of recommendations, including the following:

- Municipalities should transition towards full-cost recovery of their water and wastewater systems within five years.
- Municipalities should be required to implement a user-pay system with volume-based water metering.
- The Province should phase-out most water and wastewater grants.

The Financial Plans Regulation (O. Reg. 453/07):
The *SDWA* provides that the financial plan component of the Municipal Drinking-Water Licence Program must be prepared either in accordance with the *SWSSA* or in accordance with requirements set out by the Minister of the Environment. With the *SWSSA* still not in force, MOE has chosen instead to develop financial plan requirements through the Financial Plans Regulation under the *SDWA*.

Information to be included in the Financial Plan:
The Financial Plans Regulation requires all owners of municipal residential drinking-water systems to prepare Financial Plans that detail the system's financial information for a period of at least six years into the future. Specifically, the Financial Plans must include information regarding the projected financial operations of their drinking-water system for each year. The information must be itemized by:

- total revenues (broken down into water rates, user charges and other revenues);
- total expenses (broken down into amortization expenses, interest expenses and other expenses); and
- annual and accumulated surplus or deficit.

For existing systems only (i.e., not new systems), the Financial Plans must also include:

- details of the system's projected financial position for each year (itemized by total financial assets, total liabilities, net debt, and non-financial assets);
- details of the system's projected cash flow; and
- financial information relating to the replacement of lead service pipes.

For new municipal drinking-water systems, the Financial Plan must also include a statement that the financial impacts of the drinking-water system have been considered.

Approval of Financial Plans:
The regulation requires that the Financial Plans be formally approved by the owner of the municipal system through a resolution. The resolution must be passed by either the municipal council (if it is owned by the municipality) or the governing body of the owner (if the municipality is not the owner). For new municipal drinking-water systems, the resolution must also state that the drinking-water system is financially viable, although the term "financially viable" is not defined.

The regulation does not require Financial Plans to be approved by the province. However, the owners are required to submit a copy of the Financial Plan to the Ministry of Municipal Affairs and Housing (MMAH).

Availability of Financial Plans to the Public:
All Financial Plans must be made available to members of the public served by the drinking-water system, as requested, at no charge. The owners of the systems must also publish the Financial Plans on the Internet, but only if the owner maintains an Internet website.

Implementation Dates for Financial Plans:
The Licensing Regulation (O. Reg. 188/07 under the *SDWA*) sets out a schedule of dates by which municipalities must apply for their first Licence. These dates range between January 1, 2009, and June 1, 2010. The Financial Plans Regulation, however, provides that owners of existing systems do not need to prepare their first Financial Plan until July 1, 2010, or six months after their first Licence is issued, whichever date is later. Accordingly, the first Financial Plans for existing drinking-water systems will be required after the first Licence is already issued, rather than as a prerequisite for it. For new systems established after the initial licensing dates, Financial Plans will be required before the owners apply for the Licence.

MOE has explained that the reason for delaying the requirement for Financial Plans is due to the fact that under new municipal accounting standards, municipalities are now required to adopt full accrual accounting practices beginning January 1, 2009. As municipal compliance with the new full accrual accounting requirements in the Financial Plans is considered very important, and municipalities will have to do a significant amount of work to implement full accrual accounting, MOE delayed the implementation dates for the Financial Plans.

Updating Financial Plans:
Owners of drinking-water systems are required to update their Financial Plans before every renewal application of their Licence (i.e., every five years), and to provide a copy to MMAH. Owners are encouraged, however, to update their Financial Plans more frequently as deemed appropriate.

The Financial Plans Guideline:
MOE, in cooperation with PIR and MMAH, developed a guidance document entitled "Toward Financially Sustainable Drinking-Water and Wastewater Systems." This guideline is intended to assist municipalities in meeting their regulatory obligations to prepare Financial Plans for their drinking-water systems, as well as provide municipalities with broad practical advice regarding financial planning for both drinking-water and wastewater services.

The guideline helps explain the requirements under the Financial Plans Regulation in plain language, as well as provide some policy context for these requirements. It also provides detailed guidance on sustainable financial planning (including long-term capital planning, asset management, accounting practices and financial plan development) to assist the municipalities in planning for both their drinking-water and wastewater systems. Although the Financial Plans Regulation only requires municipalities to undertake financial planning for their drinking-water systems, the guidance materials are designed to apply equally to both water and wastewater services.

The guideline makes it clear that the intent of the new Financial Plans Regulation is to be very flexible. In the guideline, MOE acknowledges that Ontario municipalities each have different circumstances, different approaches to finances, and different starting points for their financial planning. Therefore, the province is taking a flexible, locally-driven and gradual approach to financial planning that can be tailored to meet local needs. The guideline further states that the regulatory requirements are intended to accommodate existing financial planning and accounting practices.

While the guideline explicitly states that the contents of the document are not required practice, it does set out a number of principles that it encourages municipalities to follow. Most notably, the guideline encourages municipalities to:

- use water metering and water rates to ensure that users pay for the services received, and to promote water conservation;
- use water-related revenues exclusively to meet the needs of water-related services;
- continue efforts to replace lead service lines over time; and
- include "source protection costs" related to the provision of water services in the estimate of "costs" in the Financial Plans.

Implications of the Decision

The Regulation is Being Used in Place of the SWSSA:
For the short term at least, the Financial Plans Regulation is being used instead of the *SWSSA* to define the financial plan requirements under the *SDWA*. MOE has not made it known, however, if the province's long-term intention is for the Financial Plans Regulation to supplant the *SWSSA* entirely, or if the Financial Plans Regulation is merely a transitional regulation until the province is ready to proclaim the *SWSSA* (or some alternate regulation or legislation).

Regardless of whether the Financial Plans Regulation is intended to be merely transitional or a replacement of the *SWSSA*, it appears that the province will not be implementing the *SWSSA* any time soon. It is also clear that the province is taking a more flexible, phased-in approach to requiring sustainable financial planning than the more prescriptive approach provided in the *SWSSA*. The Financial Plans Regulation requires municipalities to undertake only the first of the two steps of sustainable financial planning – e.g., to carry out a full-cost accounting. How the province intends to address the second step – e.g., require full-cost recovery – as well as address the financial sustainability of wastewater systems is not yet known.

The Financial Plans Regulation should, however, enable the province to collect financial information relating to the municipal water systems in Ontario, and to assess the different financial situations of municipal systems and their various approaches to financial planning. This information should help the province decide how to proceed with its next steps.

The Regulation Requires Full-Cost Accounting:
The Financial Plans Regulation puts in place a requirement for municipal drinking-water system owners to undertake a full-cost accounting of their systems, as recommended by Justice O'Connor back in 2002. The regulation requires municipalities to set out the full cost of operating their drinking-water system, including the projected long-term capital costs related to repairing, improving and building new infrastructure, as well as set out the total projected revenues to finance those costs (although these revenues need not be sufficient to cover the costs). Full-cost accounting is a crucial first step in moving municipalities toward financially sustainable drinking-water (and wastewater) systems. It should make municipalities more aware of the annualized investment costs of the infrastructure assets over their useful lives; it encourages better long-term planning for capital renewal and replacement; and it helps provide a more informed basis for setting water rates.

Full-Cost Recovery is Encouraged, but not Required:
Unlike the *SWSSA*, the Financial Plans Regulation does not include a requirement for full-cost recovery – the second critical component of financial sustainability as described by Justice O'Connor. While full-cost accounting is important, it alone cannot ensure a sustainable source of funding for drinking-water systems. Full-cost accounting merely requires the municipal systems to create a balance sheet. Full-cost recovery requires that balance sheet to actually balance. To ensure that municipalities are able to provide

safe drinking-water now and in the future, it is necessary to ensure a sustainable source of revenue to cover the system's short and long-term costs.

While the regulation does not explicitly require full-cost recovery, it does state that all new systems must be "financially viable", which (although not defined) arguably suggests that new drinking-water systems must achieve full-cost recovery. In addition, the guideline strongly encourages municipalities to collect sufficient revenues to cover all of their costs.

Full-Cost Pricing is Encouraged, but not Required:
In addition to recommending that municipal systems implement full-cost recovery strategies, the guideline also encourages municipal systems to introduce full-cost pricing to achieve full-cost recovery. Full-cost recovery requires that the full costs of the water (and wastewater) services are recovered (by any means). Full-cost pricing goes one step further by requiring municipal systems to cover the full costs of the water services through consumer water charges. Full-cost pricing applies the user-pay principle, requiring those consumers who benefit from services to pay for them, rather than subsidizing water and wastewater systems through other sources of revenue, such as property taxes or provincial grants.

Charging water users appropriate, volumetric rates for the water services provided (typically through the installation and use of water meters that measure the volume of water used by each customer) can encourage water conservation. The Watertight Report noted that most (but not all) municipalities in Ontario heavily subsidize their water systems, charging artificially low water rates. Subsidizing the cost of water services can encourage the overuse of water resources.

Raising sufficient revenues from local sources rather than relying on provincial grants can also facilitate long-term financial self-sufficiency. However, given that full-cost pricing (like full-cost recovery) is not required by either the regulation or the guideline, it is unknown to what extent municipalities will actually implement this recommendation, especially as increasing water rates tends to be politically unpopular.

Inclusion of Source Protection Costs is Encouraged, but not Required:
Unlike the *SWSSA*, the Financial Plans Regulation does not require municipal drinking-water systems to include source protection costs in the Financial Plan, although this is encouraged in the guideline. Including source protection costs in the calculation of water and wastewater costs can help ensure that municipalities are able to finance source protection measures, which may be required once the source protection plans are developed under the *Clean Water Act*.

No Provincial Approval:
Unlike the *SWSSA*, the Financial Plans Regulation does not require Financial Plans to be approved by the province. Accordingly, there do not appear to be any provincial controls on the quality or sufficiency of the Financial Plans. Rather, it appears that, provided the drinking-water system meets the broad basic requirements of the Financial Plans Regulation, this would be sufficient to obtain a Licence.

Public Participation & *EBR* Process

MOE posted the draft Financial Plans Regulation and the guideline on the Environmental Registry on May 4, 2007, with a 35-day comment period. Subsequent to the posting, MOE revised the notice to address stakeholder concerns about lead in drinking-water by adding a provision to the regulation requiring the reporting of financial information associated with replacing lead assets in drinking-water systems. MOE republished the notice and extended the comment period by 15 days, for a total comment period of 50 days. The decision notice for the regulation and guideline was posted on the Registry on August 16, 2007, two days after the regulation was filed.

Prior to posting the proposal notice, the ministry consulted with a stakeholder working group (composed of ministry representatives, environmental groups, municipal associations, and other interested associations), which provided input into the development of the draft regulation. In addition, concurrent with the Registry posting, MOE conducted public consultation sessions in five cities across Ontario.

Summary of Comments:
As a result of the public consultation on the proposal, the ministry received 25 comments from municipalities, professional associations and environmental groups. Overall, the comments were generally quite supportive of the regulation and guideline. Several of the stakeholders specifically commended the government on the working group process and the openness of the consultations.

Flexible, Locally-Driven Approach:
All of the municipal commenters and most of the professional associations expressed very strong support for the flexible, locally-driven approach to financial planning reflected in the proposed regulation and guideline. These commenters stated that the use of broad, high-level principles, rather than a prescriptive approach, encourages municipalities to move toward financial sustainability for their water (and wastewater) services, while allowing municipalities to integrate the regulatory requirements with their other reporting requirements and individual business practices, without significant duplication of efforts. Many of these commenters noted that they found this approach to be far preferable to the prescriptive approach found in the *SWSSA*.

The Ontario Sewer and Watermain Construction Association (OSWCA), on the other hand, commented that, although a flexible approach is admirable, strong regulatory leadership from the province in the form of more prescriptive, mandatory requirements is needed to achieve real financial sustainability in the water sector. They argued that without clear and enforceable provisions requiring municipalities to implement measures (such as full-cost pricing, water metering, assessment of leaks in water distribution systems, etc.), "municipal governments may allow the degeneration of our water infrastructure to a level that represents a health and safety risk to the Ontario public."

Failure to Require Full-Cost Pricing:
One industry and two public utility associations – namely the OSWCA, the Ontario Water Works Association and the Ontario Municipal Water Association – commented on the failure of the regulation to require full-cost pricing through the use of water rates. The OSWCA commented that the proposed regulations and guidelines fall short of the full-cost pricing regime described by Justice O'Connor in his Part II Walkerton Report. Specifically, they noted that:

- The proposed regulation does not require municipalities to charge proper water rates to ensure adequate funding for safe, reliable and sustainable water systems.
- The proposed regulation and guideline permit cross-subsidization by allowing municipalities to fund a portion of the water costs out of property tax revenues.
- The proposed regulation and guideline do not require that revenues from water charges be placed in a dedicated reserve fund for the exclusive use of water-related services (although the guideline recommends it).
- The proposed regulation does not require water metering (although the guideline recommends it).

These associations argued that the water rate structure should enable the water systems to be fully self-sufficient. Accordingly, they recommended that the regulation should prohibit municipalities from subsidizing water services out of property tax revenues. The OSWCA also recommended that dedicated water reserves should be required, arguing that the isolation of water revenues and reserves in separate, transparent accounts is the key to ensuring the adequacy of water rates and capital financing.

A few municipalities similarly commented that the guideline should more clearly encourage full-cost recovery, with no funding from property taxes, and a user-pay system with full metering (i.e., elimination of flat rates) – as recommended by the expert panel in the Watertight Report. The Association of Municipal Managers, Clerks and Treasurers (AMCTO), on the other hand, opposed the implementation of the Watertight recommendations.

Requirement to Forward Forecast the Balance Sheet:
Several municipalities and associations noted that most municipalities already undertake extensive financial planning relating to their water and wastewater services, and that some of the proposed regulatory requirements will entail significant additional time and costs with little additional benefit.

Specifically, some of these commenters expressed concern about the requirement to forecast the water system's financial position for six years. These groups explained that, while it is normal to project forward an income statement (which shows projected revenues and expenses), balance sheet items (such as non-financial assets, tangible assets, betterments, liabilities, etc.) are typically shown as a snapshot in time, and are not projected forward. They argued that this requirement will require a significant amount of additional work for the municipalities without providing a substantial benefit.

Need for Further Clarification:
Several commenters requested clarification of some of the technical financial terms (e.g., betterments, write downs) in the draft regulation. A few commenters also noted that, for municipalities to be able to pass a resolution indicating that new drinking-water systems are financially viable, the term "financial viable" should be defined. One association also suggested that the guideline should provide more direction on issues such as how to factor grants and development charges into Financial Plans.

Replacement of Lead Service Lines:
A number of environmental groups commented that the recommendation in the proposed guideline that municipalities locate and replace lead service lines should be placed in the regulation as a mandatory requirement to ensure that municipalities address the threat of lead contamination in drinking-water in a timely manner. These groups noted that Justice O'Connor recommended in the Walkerton Report: "As part of an asset management program, lead service lines should be located and replaced over time with safer materials."

Changes made in response to Comments:
In response to the stakeholder comments, MOE made several minor revisions to the draft Financial Plans Regulation, including the following changes:

- MOE added a new category – total financial assets (but only if the information is known).
- MOE clarified the requirements for reporting non-financial assets by including specific subcategories of non-financial assets to be included in the Financial Plans.
- MOE more clearly defined the tangible capital assets category and broke it down into subcategories.
- MOE added a requirement for municipal systems to identify which of its costs relate directly to the replacement of lead service pipes.

The ministry also made a number of revisions to the guideline to incorporate comments made by the stakeholders. For example, the ministry clarified a number of the principles in accordance with the comments received, as well as added a new principle stating that revenues collected for the provision of water and wastewater services should be dedicated to meeting water needs. The ministry also revised the section in the guideline relating to dedicated reserves to address the stakeholder comments about the importance of dedicating revenues to water needs. More generally, the ministry also expanded the plain-language description section of the Financial Plans Regulation.

SEV

MOE provided a brief statement indicating that the Financial Plans Regulation and associated guidelines contribute to MOE's commitment to protect the environment by supporting municipalities in planning for long-term financial sustainability of their drinking-water and wastewater systems. They state that consistent province-wide financial planning will help ensure that Ontarians continue to enjoy clean, safe and reliable drinking water services. They also note that the guideline advocates the conservation of water through the promotion of leak detection programs and methods, and promotes a user-pay approach, which can improve conservation.

Other Information

In addition to the Registry notice for the Financial Plan Regulation, MOE also posted the following notices as part of the Municipal Drinking Water Licence program:

- *The Licensing of Municipal Drinking Water Systems Regulation*, O. Reg. 188/07 under the *SDWA* (Registry number RA06E0015). This regulation, filed May 2007, sets out the dates by which the Owners of municipal drinking-water systems must submit their Operational Plans, and apply for their Drinking Water Works Permits and Municipal Drinking Water Licences.

- *The Accreditation Protocol for Operating Authorities* (Registry number PA06E0010). This policy, finalized on July 31, 2007, outlines the roles and responsibilities of the "Owners", "Operating Authorities", "Accreditation Bodies" and "Auditors" when accrediting the "Operating Authority."

- *Director's Direction for Operational Plan Submission* (Registry number PA06E0011). This policy, finalized on July 31, 2007, outlines the requirements for the submission of the Operational Plans.

- *Drinking Water Quality Management Standard Guidance Document* (Registry number PA06E0012). All Owners and Operating Authorities are required to develop an Operational Plan, which includes a quality management system (QMS). The QMS must meet the requirements of the Drinking Water Quality Management Standard (DWQMS). This guidance document, finalized on July 31, 2007, is intended to assist Owners and Operating Authorities in the development of the QMS, and to provide additional information about the requirements for Operational Plans.

- *Drinking Water Quality Management Standard* (Registry number PA05E0033). This document, finalized on October 30, 2006, sets out the requirements for a quality management system to ensure that Owners and Operating Authorities are effectively managing and operating high-quality drinking water systems.

ECO Comment

Approximately six years after the province first passed the *Safe Drinking Water Act* and the *Sustainable Water and Sewage Systems Act*, the ministry is finally implementing a requirement for municipal drinking-water systems to develop Financial Plans. The Financial Plans Regulation puts into place a long overdue requirement for municipalities to develop a full accounting of their drinking-water systems – the first step in moving municipal systems toward financial sustainability. The Financial Plans should help municipalities make the fundamental link between asset management and financial planning, which will hopefully result in better long-term planning for capital renewal and replacement, as well as more appropriate setting of water rates.

It appears, however, that the Financial Plans Regulation is being used, at least temporarily, to replace the more comprehensive and prescriptive requirements developed under the *SWSSA*. The Financial Plans Regulation cannot reasonably be viewed as an adequate replacement for the *SWSSA*. Whereas the *SWSSA* would require municipalities to develop financial plans for both drinking-water and wastewater systems, the Financial Plans Regulation only applies to drinking-water systems. Where the *SWSSA* would require municipal systems to develop both a full-cost accounting plan and a full-cost recovery plan, the Financial Plans Regulation only requires a full-cost accounting plan. And, where the *SWSSA* would provide strong mandatory requirements, such as a requirement for provincial approval of the financial plans, the Financial Plans Regulation provides a much more permissive and flexible approach.

The ECO is very disappointed that the new regulation does not include requirements for full-cost recovery and full-cost pricing. Full-cost recovery of a water system's total costs is necessary for the system to achieve financial sustainability and self-sufficiency. Unfortunately, most municipal water systems in Ontario are nowhere near achieving financial sustainability. However, the necessary shift by municipal systems to full-cost recovery – to both overcome their enormous infrastructure deficits and to achieve financial sustainability – is bound to be politically unpopular, and thus is unlikely to be undertaken on a voluntary basis. Accordingly, a mandatory and timely requirement for full-cost recovery is needed. The longer the province delays instituting such a requirement, the more likely that the existing infrastructure deficits will grow – potentially threatening the safety of the province's drinking-water supply systems.

In addition, requiring municipalities to charge water users appropriate, volume-based rates for the water services provided can help encourage water conservation. Currently, most municipalities in Ontario heavily subsidize their water and wastewater systems (through sources such as property tax revenues and provincial grants) and charge artificially low water and sewer rates. Subsidizing the cost of water services can provide a disincentive for consumers to conserve water resources. The ECO believes that there is room for most municipal systems in Ontario to raise their water rates, which for the most part are quite low compared to many other jurisdictions, as well as compared to other household costs (such as television and internet services).

The ECO also notes that the Financial Plans Regulation does not require municipal systems to replace the lead pipes in their water systems. Rather, it merely requires municipal systems to note in their Financial Plans which of their costs (if any) relate to lead pipe replacement, while the guideline simply encourages municipalities to replace lead lines. Therefore, the ECO disagrees with the ministry's claim (as stated on its website) that these provisions meet Justice O'Connor's recommendation that municipalities locate and replace lead service lines as part of an asset management program.

While it is still not clear whether the province intends for the Financial Plans Regulation to replace the *SWSSA*, or whether it is merely the first step in a phased-in approach to requiring water systems to become financially sustainable, the ECO notes that the Financial Plans Regulation alone is unlikely to push most municipal systems towards achieving financial sustainability. Therefore, the ECO urges the ministry to follow up on the Financial Plans Regulation in a timely manner – by either proclaiming the *SWSSA* or developing some other comparable legislation or regulation – to ensure that financial sustainability is achieved for all municipal drinking-water and wastewater systems in Ontario.

Review of Posted Decision:

4.12 Ontario Regulation 496/07 under the *EPA* – Cessation of Coal Use

Decision Information:

Registry Number: 010-0945	Comment Period: 30 days
Proposal Posted: July 12, 2007	Number of Comments: 403
Decision Posted: August 24, 2007	Came into Force: August 24, 2007 (Date Filed)

Title: Implementation of Coal Emissions Reductions
Registry Number: 010-3530
Proposal Posted: May 16, 2008
Comment Period: 30 days

Description

In July 2007, the Ministry of the Environment (MOE) posted a proposal notice on the Environmental Registry for a regulation under the *Environmental Protection Act* (*EPA*) that would end the use of coal at the Atikokan, Lambton, Nanticoke and Thunder Bay electricity generating stations after December 31, 2014. One month later, MOE posted its decision to approve the regulation. Ontario Regulation 496/07 was filed with the Registrar of Regulations on August 24, 2007.

Ontario's coal-fired power plants currently produce 6,434 megawatts of electricity and generate approximately 16-20 per cent of the province's electricity supply. Coal has been integral in Ontario's electricity supply. Coal provides intermediate and peaking capacity to cater to fluctuations in Ontario's electricity demands. In other words, coal offers operational flexibility to supplement base load capacity when necessary and provide power for periods of maximum demands. Ontario also has the ability to import or export approximately 4,000 megawatts to U.S. states and Manitoba and Quebec. Exports and imports to and from the U.S. regularly involved electricity generated from coal fired power plants, however, electricity imports from Manitoba and Quebec are from hydroelectric sources.

The main downside of using coal to generate electricity is the ensuing environmental and health costs. Coal plants account for 22 per cent of pollutants that create smog and acid rain. In 2003, the five coal plants emitted 37,000 tonnes of nitrogen oxides (14 per cent of all nitrogen oxides produced in Ontario), 154,000 tonnes of sulphur dioxide (28 per cent), and 495 kilograms of mercury (20 per cent). Coal plants also produce 3.4 million kilograms of toxic wastes contained in ash.

In our 2003-2004 and 2005-2006 Annual Reports, the ECO described the serious ecological and human health impacts arising from coal-fired power plants and called on MOE and ENG to develop a plan to reduce air emissions produced by these generating stations. These air pollutants contribute to adverse human health effects such as respiratory illnesses. A 2005 study commissioned by the Ministry of Energy, found a link between air pollution from coal-fired power plants and up to 668 premature deaths, 928 hospital admissions, 1,100 emergency room visits and 333,600 minor illnesses on an annual basis.

Coal-fired power plants are also major emitters of greenhouse gases, a known contributor to climate change. The Ontario Clean Air Alliance released a report that found Ontario's carbon dioxide emissions from coal plants rose 90 per cent from 1995 to 2005 and comprised of 40 per cent of the province's carbon dioxide emissions from industrial sources. Environment Canada's figures indicate that Ontario Power Generation's fossil fuelled plants (which are all coal-fired except for one plant) accounted for approximately 15 per cent of the carbon dioxide equivalent emissions produced in Ontario, and the four remaining coal plants produced 24.7 million tonnes of greenhouse gases in 2006.

North America's largest coal-fired power plant is the Nanticoke generating station located near Lake Erie. In 2006, the plant burned eight billion kilograms of coal. It is the province's largest emitter of nitrogen oxides and second biggest emitter of sulphur dioxide, both of which contribute to smog and acid rain.

Nanticoke was Canada's largest point-source generator of greenhouse gases in 2005 (17.6 million tonnes annually).

Ontario Power Generation (OPG) has considered trying to capture or limit the release of pollutants; however, OPG staff acknowledged in February 2007, that commercially available emission controls do not address greenhouse gases and retrofitting plants scheduled for closure would be too costly.

In 2003, the newly elected Liberal government promised that it would close Ontario's coal-fired power plants by 2007 and replace them with cleaner energy sources. In April 2005, Lakeview generating station in southern Mississauga, was the first plant to be closed after projects to strengthen the transmission system in the Toronto area were completed. Lakeview was considered to be the single largest contributor to smog in the Greater Toronto Area.

In 2005, the government decided to push back the deadline to close the remaining plants to 2009, and then in June 2006 determined that it would delay the closing of the plants past the 2009 target. Although the Ontario government remained committed to coal cessation, it stated its decision to abandon the 2009 target was based on the Independent Electricity System Operator's revision of its projected supply capacity and future demand requirements, which was the basis of the 2009 deadline. Consequently, the Minister of Energy (ENG) requested the Ontario Power Authority (OPA) to develop a "revised plan for replacing coal-fired generation in the earliest practical timeframe without compromising reliability" and to "recommend cost-effective measures to reduce air emissions from coal-fired generation."

In February 2007, the OPA published a summary of its preliminary Integrated Power System Plan (IPSP or the "plan"). The plan was officially filed on August 29, 2007, to the Ontario Energy Board for review and approval. The IPSP plans Ontario's energy strategies and outlines the steps needed to secure a reliable energy supply for the next 20 years up to 2027. The OPA has committed to updating the plan every three years to adapt to changing conditions. The IPSP maps out how to achieve four key results:

- Limiting growth in electricity demand through conservation;
- Replacing coal in the power supply mix with renewable energy and natural gas;
- Restoring nuclear power through refurbishments and new builds; and
- Reinforcing transmission for better and reliable service.

The IPSP states that the Ontario government has "decided to phase out coal-fired power generation in the province as quickly as possible." The plan outlines that:

> Coal-fired generation should be gone from the Ontario power system by 2014. We will use less coal starting in 2011 as new power sources, such as conservation, renewable resources and new natural gas generation, come online. Separately from the Integrated Power System Plan, the OPA will report to the Ontario government on the options available to reduce the emissions from coal-fired plants during the phase-out period.

According to the plan, the province intends to replace coal with natural gas and renewable resources such as hydroelectric, wind, solar and bioenergy. The OPA predicted in its preliminary plan that by 2027 the capacity mix will be derived from the following sources: nuclear at 27 per cent, gas/oil at 25 per cent, hydroelectric dams at 21 per cent, renewables at 13 per cent, conservation at 11 per cent and miscellaneous at three per cent.

In June 2007, the Ontario government announced its greenhouse gas targets to fight climate change. The government pledged to reduce "greenhouse gases to six per cent below 1990 levels by 2014, or 61 megatonnes". To meet the 2014 greenhouse gases targets, the government stated that it would continue working towards closing the coal plants and carrying out existing policies which it anticipated would account for 50 per cent of emissions reductions. This announcement was followed up with the August 2007 release of the government's *Go Green Action Plan on Climate Change* (hereafter the "action plan"). The action plan committed to end coal-fired generation by the end of 2014, and investing in renewable energy and conservation by allocating $150 million to such initiatives. Several programs included: Home Energy Retrofit, sales tax exemption for Energy Star products, and promoting solar power and green power by providing various financial and tax incentives.

In July 2007, MOE posted the proposed cessation of coal use regulation on the Environmental Registry for comment. Relying on the IPSP, the government drafted a regulation that would end the use of coal at the four listed generating stations by December 31, 2014.

Implications of the Decision

Ontario Regulation 496/07 requires the province to end the use of coal in the four remaining generating stations by the end of 2014. Despite abandoning its initial cessation target of 2007, the government noted that since 2003, Ontario has closed one plant and reduced greenhouse gas emissions from coal plants by almost one-third. The IPSP projects another one-third cut in greenhouse gas emissions between 2006 and 2011.

Reducing and eventually eliminating the use of coal will improve the health of the environment and Ontarians by eliminating harmful pollutants and greenhouse gases they release into the environment. A 2005 study conducted for the Ministry of Energy calculated the true cost of coal was $4.3 billion annually when the health and environmental impacts due to air pollution were tabulated. The study concluded the lowest electricity costs for Ontario would result from a combination of refurbished nuclear and new natural gas generation, which would cost $1.9 billion annually including health and environmental impacts. The study also estimated that imposing greenhouse gases control measures and carbon sequestration to capture greenhouse gases from coal-fired power plants would cost approximately $371 million per year.

The regulation, the IPSP and climate change action plan together have spurred Ontario to invest in a diverse range of electricity generating strategies for the next 20 years. Based on Ontario's energy road map as set out in the IPSP, Ontario would continue developing and investing in conservation and renewable energy, as well as nuclear and natural gas. In the near term (2008-2010) the IPSP emphasised conservation programs, putting the coal phase-out plan into action, and developing or improving hydroelectric resources, combined heat and power facilities, natural gas generators and transmission reinforcements. In the medium term (2011-2015) the plan called for the phasing out of coal-fired generation and developing wind generation. In the long term (2016-2027) the plan examined whether to retire, replace or refurbish nuclear units and the development of hydroelectric sites in northern Ontario.

Implementing the government's coal replacement strategy will require significant financial resources to promptly bring online enough energy sources to make up for the loss of coal and meet Ontario's electricity demands. Emphasis has been placed on conservation, natural gas, hydroelectric, other renewable energy, and nuclear. As of October 2007, the OPA had made contracts with electricity generators totalling 10,636 megawatts of electricity supply. This investment totals $16.14 billion; the vast majority of these contracts have been signed with OPG and other large companies.

In addition to announcements on the plans to develop wind, solar and hydroelectric power, the Ontario government had also made announcement on other forms of energy that are considered cleaner than burning coal, but pose other environmental concerns relating to the fuel sources, waste, emissions or establishment of these generation capacities. The government stated that it intended to refurbish two nuclear units at Bruce Power to return to service 1,540 megawatts. The province then issued a request for proposals in March 2008 to build a new two-unit nuclear plant that would provide 2,000-3,500 magawatts of baseload generation capacity. The IPSP has limited the total nuclear capacity to no more than 14,000 megawatts. By the end of 2015, 900 megawatts of additional hydroelectric power is expected to come online, and a possible 2,000 megawatts could further be added from undeveloped sites in northern Ontario. Bioenergy derived from forestry, agricultural biomass/biogas and municipal solid wastes and municipal wastewater biogas are to account for 200 megawatts by 2015 and 450 megawatts by 2027. More than 7,000 megawatts of new natural gas-fired resources could be added over the next 20 years, with 4,300 megawatts already committed. The IPSP advises that natural gas be used during high-demand periods or when renewable resources are unavailable.

Public Participation & *EBR* Process

The proposal for O. Reg. 496/07 was posted on the Registry for 30 days (from July 12, 2007 to August 11, 2007) and received 403 public comments. The majority of the commenters came from concerned individuals. Other commenters included environmental groups, various public health agencies and organizations, chambers of commerce/boards of trade, industry associations, unions, and municipalities.

MOE stated that all comments were considered by the ministry. The majority of commenters (297 comments or 74 per cent) supported the initiative to replace coal. However, many of these commenters did not support the 2014 closure deadline, arguing that the cessation date should be earlier. The remaining commenters opposed the proposed regulation to end the use of coal in coal-fired power plants.

The decision notice summarized the comments received and MOE's response to the comments. MOE did not amend the proposed regulation to reflect the comments submitted.

Nearly 50 per cent of commenters, including environmental organizations and public health officials, requested that the regulation include interim reduction targets for coal and approximately 25 per cent of commenters requested an earlier or immediate deadline for the use of coal. MOE responded to these recommendations by stating that greenhouse gas emissions from coal-fired plants have been reduced by 29 per cent since 2003, and the OPA suggests that emissions will continue to be reduced on an ongoing basis. MOE committed to monitor coal replacement and consider whether further regulations were necessary.

Sixteen per cent of commenters, including business and industry associations and unions, opposed the regulation and instead preferred the installation of emission controls at the coal plants. Eight per cent of commenters believed that the Atikokan and Thunder Bay stations should remain open because air quality is better in northern Ontario and the facilities are important to the northern economy. Sixteen per cent of commenters opposed the regulation because of potential negative economic consequences such as higher electricity rates. MOE disagreed with these comments, stating conservation and cleaner energy sources are commercially viable and cost-effective.

Eleven per cent of commenters opposed the regulation because they believed an adequate replacement to coal was not available or were concerned that the phase-out will support the OPA's expected move towards additional nuclear or natural gas capacity. MOE replied by stating that the OPA was working on securing cleaner generation sources, and the government had placed a greater emphasis on conservation and efficiency options.

Several commenters also proposed a ban on all coal used in the province, and expressed concerns over possible increased imports of electricity from dirtier coal-fired power plants in the US. MOE stated a ban could jeopardize the cogeneration of electricity from industrial process waste heat and these sectors continue to be covered by air quality regulations. MOE also pledged to continue working with its US partners to reduce transboundary air pollution.

Additional comments on the proposed regulation included suggestions that emission caps for all fossil generation be reduced; a carbon tax should be used in lieu of closing the plants; and regulate the transportation sector rather than coal plants. MOE stated it would "consider what other regulatory steps need to be taken between now and 2014 to support its clean air agenda."

SEV

In its Statement of Environmental Values (SEV) briefing note, the ministry addressed how the regulation complied with its three guiding principles – ecosystem approach, environmental protection and resource conservation. MOE stated that closing the coal-fired generating stations would reduce the release of greenhouse gases and air contaminants and would help achieve a cleaner and healthier environment. This in turn would mitigate an estimated $3 billion a year in health and other environmental damages and would position Ontario in the "forefront of efforts to combat climate change." Ontario's coal replacement would be the "single largest Canadian greenhouse gas reduction initiative." The regulation supported other government policies aimed at more efficient and cleaner generating technologies and increased emphasis on energy conservation, all of which will be used to replace coal.

Other Information

In June 2007, the Ontario government announced that it would be implementing measures to ensure its efforts on greenhouse gas reductions would be subject to transparent and accountable review process. One such measure was a government commitment to provide an annual report of its progress in reducing greenhouse gas emissions to the Legislative Assembly that would be independently reviewed by the Environmental Commissioner of Ontario.

In March 2008, the federal government published its climate change plan. The federal Environment Minister announced that OPG and other large polluters must reduce the intensity of their greenhouse gas emissions by 18 per cent by 2010 and two per cent annually after that. Polluters whose cumulative emissions fail to meet these targets would face financial penalties in the form of carbon credits or paying into a new technology fund. However, the minister stated that instead of contributing to the technology fund, OPG would be able to spend the resulting penalties on new nuclear or natural gas stations or renewable energy projects.

MOE appears to have considered the commenters' concerns about the lack of interim targets in the coal cessation regulation, and subsequently posted a proposed regulation to amend O. Reg. 496/07 in May 2008. The proposed regulation revokes section 2 of O. Reg. 496/07 and substitutes the following two clauses into the regulation:

1) Interim cap on CO_2 emissions: Beginning on January 1, 2011, the four generating stations shall not collectively emit more than 11.5 megatonnes of carbon dioxide from the use of coal in any calendar year.

2) Quarterly progress reports: The four generating stations shall submit reports to MOE for each quarter of the next six years starting in 2009. The reports will set out the amount of carbon dioxide that generating stations collectively emit from the use of coal in the quarter; and a forecast of the amount of carbon dioxide that the generating stations are expected to emit from the use of coal in that calendar year and in each subsequent year.

The government aims to cut coal plant emissions by two-thirds below 2003 levels by 2011. If passed, the amendment will require OPG to limit greenhouse gas emissions from its coal plants to 11.5 megatonnes in 2011, down from 34.5 megatonnes released in 2003. At the time of writing, the proposal's 30 day comment period had not expired.

ECO Comment

The ECO is pleased to see the Ontario government making a concerted effort towards reducing greenhouse gases and air pollution from coal-fired power plants. . Further, the ECO commends the Ontario government for the investments it has made in conservation and renewable energy sources, as well as the greenhouse gases reductions it has achieved to date.

We recognize that the government's decision to eliminate coal from the energy mix required careful planning to avoid a gap in the supply mix that would cause a disruption in electricity generated or a spike in prices. The ECO believes that it is the right time to work towards ending the use of coal. The environmental and health impacts from the use of coal are too great and costly to continue in the long-term, as documented in the various studies prepared for the government.

The ECO notes that a sizable number of commenters criticized O. Reg. 496/07 for lacking interim targets. We are pleased that MOE has considered the public comments, and posted its proposed amendment to the regulation that incorporates an interim target for limiting greenhouse gas emissions from coal plants and institutes quarterly reporting requirements.

Furthermore, the ECO notes that opponents of the regulation touted coal as economically viable fuel for electricity because it is relatively inexpensive and readily available. However, the ECO is aware of several studies that suggest that the world is approaching a peak coal situation much sooner than expected due to rising consumption rates and unreliable reserve estimates. One group of scientists concluded that the global output of coal could peak as early as 2025 and then fall into terminal decline. The availability of coal is being hotly debated within the energy industry. However, one conclusion that could be drawn from coal trends is that despite the fact that the price of coal has quintupled since 2002, coal reserves are falling instead of new reserves being developed to take advantage of the high prices. This could suggest that the easily mined coal has been largely produced.

In light of the government's announcements on its progress and investments towards phasing out the use of coal, and the expectation that new electricity supplies will become operational in the next two to three years, the ECO encourages the government to cease using coal as new energy sources come online. Based on the government's progress thus far, the ECO is hopeful that the government can safely close the coal-fired power plants before the 2014 deadline. As of October 2007, the OPA had contracted more than 10,600 megawatts of new electricity supply, which is greater than the approximately 6,400 megawatts currently being generated by the coal-fired power plants. In fact, the OPA said it was possible to "...gradually reduce the coal-fired capacity starting in 2011 to about half of the current installed capacity", as new power sources, such as conservation, renewable resources and natural gas generation, come online.

Given the importance of tackling climate change and air pollution, and the fact that the ECO will review the government's greenhouse gas reductions progress report, the ECO intends to continue monitoring the government's progress on the elimination of coal-fired power plants. We will also follow the development of new energy sources to ensure they comply with the provisions of the *Environmental Bill of Rights*.

Review of Posted Decision:

4.13 Regulation under the *OWRA* for the Protection of Lake Simcoe

Decision Information:

Registry Number: 010-2246	Comment Period: 60 days
Proposal Posted: December 6, 2007	Number of Comments: 21
Decision Posted: March 27, 2008	Decision Implemented: April 1, 2008

Description

On March 26 2008, the Ministry of the Environment (MOE) filed O. Reg. 60/08, the Lake Simcoe Protection Regulation, under the *Ontario Water Resources Act* (*OWRA*). This new regulation specifies phosphorus loading limits into Lake Simcoe from all sewage treatment facilities in the Lake Simcoe basin (the basin) for an interim period (April 1, 2008 – March 31, 2009). The regulation will govern discharges into the basin by:

limiting the total phosphorus loadings from existing municipal and industrial sewage treatment plants within the basin;
prohibiting the establishment of new municipal or industrial sewage treatment plants in the basin; and,
imposing stringent design standards on new stormwater facilities that service new developments located in the basin.

Scientific studies undertaken in the 1970s and 1980s by the MOE, the Ministry of Natural Resources, the Ministry of Agriculture, Food, and Rural Affairs, and the Lake Simcoe Region Conservation Authority (LSRCA) identified phosphorus enrichment of the lake as a key water quality problem. Phosphorus inputs from urban stormwater runoff, sewage treatment plant (STP) effluents, agricultural practices and other sources, caused prolific growth of aquatic plants and algae and resulted in levels of dissolved oxygen in the water which were too low to support the successful natural reproduction of cold water fish, such as lake trout, lake whitefish, and lake herring. In response, in 1990, the Lake Simcoe Environmental Management Strategy (LSEMS) partnership was initiated. The goal of the LSEMS is to improve and protect the health of the Lake Simcoe watershed ecosystem, improve associated recreational opportunities and restore a self-sustaining coldwater fishery. In order to further improve the health of the Lake, further restrictions need to be imposed on activities causing phosphorus discharges.

This regulation is part of a larger, ongoing project to develop a Lake Simcoe protection strategy. It is one of many steps that can be taken to reduce phosphorus loadings into Lake Simcoe. Phosphorus enters the lake from various sources (see Table 1). This regulation will only address phosphorus from urban wastewater, one of the lower contributors of total phosphorus (seven per cent) to Lake Simcoe. It should be noted though, that much of the phosphorus from STPs is in soluble form and is therefore more bioavailable.

Table 1: Sources of Phosphorus in Lake Simcoe based on LSEMS Phase III Progress Report, 2007

Source of Phosphorus	Proportion of Overall Phosphorus (per cent)
Rural & Agricultural	36
Atmospheric	35
Urban Stormwater	13
Urban Wastewater*	7
Septic Systems	6
Holland Marsh Polders	3

* Regulation applies to this source

Implications of the Decision

Limits the Total Phosphorus Loadings:
The regulation will impose a 12-month phosphorus loading limit to each of the 14 existing municipal STPs and the one industrial STP located in the basin that contribute phosphorus to Lake Simcoe. The regulation "will be in addition to and take precedence over" each plant's sewage works approval issued under section 53 of the *OWRA*. MOE states that the phosphorus loading limit is based on two parameters: 1) the projected flow of sewage that is anticipated at the STP over the 12-month period; and 2) the plant's engineering design concentration for total phosphorus (this is the level of performance that the STP is designed to achieve). MOE also states that a small margin would be added to the first parameter to accommodate any planned development that had already been approved. If an STP is given approval under section 53 of the *OWRA* for "temporary relief from complying with a total phosphorus discharge limit", the amount of phosphorus discharged during the relief period will not be counted when determining whether the STP has complied with the regulation.

Currently, the 15 existing STPs can, under their respective permits, collectively discharge up to approximately 12.5 tonnes of total phosphorus each year. Although this is the permitted limit, in reality, the plants discharged a collective total of 5.9 tonnes of phosphorus in 2006. For the 12-month period under the regulation, the total permitted limit will be 7.3 tonnes. As pointed out by MOE in its decision notice, the regulation will require the owner of each STP to record and report on the amount of total phosphorus discharged each month the regulation is in effect. Testing for total phosphorus will be required to be in accordance with MOE's guideline, "Procedure for Sampling and Analysis: Requirements for Municipal and Private Sewage Treatment Sewage Works (Liquid Waste Streams Only) (Procedure F-10-1)." The limits for each STP are listed in the regulation.

Prohibits the Establishment of New STPs:
The regulation prohibits the establishment of a new STP in the basin during the 12-month period. It does not, however, prohibit an expansion or replacement of an existing plant, providing the phosphorus loading does not exceed the specified amount.

Imposes Design Standards on New Stormwater Facilities:
The regulation restricts the Director, appointed under sub-section 53(3) of the *OWRA*, from issuing "an approval under section 53 for the establishment of new sewage works designed to manage stormwater" unless the Director is satisfied that the proposed facilities will be designed to meet the "enhanced protection level" specified in MOE's "Stormwater Management Planning and Design Manual 2003." This applies to new development that obtains an approval under the *Planning Act* or *Condominium Act* after April 1, 2008. This provision does not apply to the construction of stormwater facilities that are designed to service existing development.

Public Participation & *EBR* Process

Twenty-one comments were received on the proposal notice. Most of the comments were generally supportive of the proposed regulation. The development industry requested clarification/confirmation that already approved development could proceed and requested representation on the multi-stakeholder working group that MOE will establish to assist with the development of a Lake Simcoe strategy.

MOE met with the municipalities within the basin in December 2007 and January 2008 to discuss the proposed regulation. Subsequent to those meetings, the municipalities provided comments on the Registry proposal. Durham Region was concerned that the regulation would not address the most significant sources of phosphorus and that money would be better spent improving farm practices through incentive programs and educating urban homeowners about how to reduce phosphorus and conserve water. They were also concerned that the regulation does not state the amount of phosphorus that is actually being contributed from the STPs and that the technical and economical feasibility of the proposed method for reducing phosphorus is questionable. Durham Region also felt that there would be insufficient flexibility with the limits to accommodate naturally occurring events (i.e., severe weather events).

A common theme in the comments from the municipalities was the notion of fairness and equity. Both York Region and Durham Region stated that there still needs to be room for the growth that is permitted under the *Places to Grow Act* (*PGA*) (and to allow for all of the development that is already approved) and York Region further noted there should be credit when a municipality is already reducing phosphorus loading into Lake Simcoe through other mechanisms. York Region also stated that 'poor' facilities should be required to improve before 'good' facilities are subjected to more regulations. Municipalities perceive this regulation as a potential restriction on their ability to grow. Durham Region in particular is concerned that the regulation would limit growth in communities that have seen little growth in recent years. As with the development industry, there were requests for representation on the proposed Lake Simcoe strategy working group.

The LSRCA reiterated the comment that reducing phosphorus loads from STPs will not address the larger sources of phosphorus loadings into Lake Simcoe. Phosphorus from STPs is the easiest to address but not the most cost-effective. The LSRCA stated that the Holland Marsh polders should be included as a large emitter of phosphorus. The LSRCA also requested that historical and current data be made available for anyone who requests it, in order for the process to be as open and transparent as possible. The LSRCA has required level 1 (enhanced protection level) on all stormwater ponds and retrofits since 1995 so the proposed regulation is in keeping with practices that they already enforce.

Several environmental non-governmental organizations also provided comments on the proposed regulation. York-Simcoe Naturalists recommended that existing applications for new or expanded STPs should be put on hold and that the limits should apply equally to both STPs and stormwater ponds. The same organization also suggested that more funding and capacity for monitoring/inspections should be required during the regulation period. They also recommended that the one-year timeline should be extended to allow more time for a substantial effect to occur. Ontario Nature (as well as Environmental Defence and the Rescue Lake Simcoe Coalition) expressed concern that the 7.5 tonnes proposed as the permitted aggregate phosphorus loading from all of the plants, should not become an allowable average limit. These groups also recommended that a monthly report from the plants be sent to MOE and that the details around the sampling protocol be required in the regulation along with a recommendation that sampling be done through an automated process.

Several stakeholders offered questions and comments that were beyond the scope of the proposed regulation but were in anticipation of potential regulations/policies that could be a part of the Lake Simcoe protection strategy or potentially a part of new legislation for Lake Simcoe. Such comments included the general support of a phosphorus-trading or nutrient-offsetting system. The Building Industry and Land Development Association stated that the province should implement phosphorus-reduction incentive programs for landowners. One developer made the observation that many of the problems with Lake Simcoe, such as water quality, are a result of old developments in the basin, not new developments using new technologies. The LSRCA commented that targets that were stated in the assimilative capacity study for Lake Simcoe should be set in legislation.

MOE responded to stakeholder concerns by making the following comments in its decision notice:

- Loading limits for all the facilities in the basin were calculated in a fair and consistent manner.

- Development that is approved and expected to be hooked up by March 31, 2009 can proceed. The responsibility of allocating servicing resides with a municipality. The provisions of this regulation are not anticipated to directly influence the allocation of servicing.
- The limits clearly apply only to the period April 1, 2008 to March 31, 2009. Limits beyond that period will be considered as part of developing the Lake Simcoe Protection Strategy.
- The monitoring and reporting of discharges into the basin could be considered as part of the long-term Lake Simcoe Protection Strategy.
- During the development of the long-term Strategy, mitigation or control measures for other contaminants and sources of phosphorus (such as septic systems, non-point and point sources) will be examined.
- The total loading limits should be met during typical natural occurrences (storms). Non-compliance due to extreme natural occurrences shall be handled in a manner consistent with MOE's compliance protocol.

Requests for involvement on the committees and other comments related to the long-term Strategy have been noted.

MOE did not address the comments regarding growth limits and potential conflicts with legislation such as the *PGA*. The ministry also did not respond to comments about the cost-effectiveness of this regulation.

SEV

The ministry stated that in developing this regulation, it took into account the following SEV considerations: the ecosystem approach, resource conservation and environmental protection. MOE stated that the regulation will help improve oxygen levels in Lake Simcoe and overall water quality.

Other Information

MOE also posted a proposal notice on the Registry on March 27, 2008 (*EBR* Registry number 010-2974) for a policy titled "Protecting Lake Simcoe: Creating Ontario's Strategy for Action." This discussion paper: describes the government's commitment to developing a Strategy to protect Lake Simcoe; outlines the process by which the province proposes to develop the Strategy; and describes what has been accomplished so far through LSEMS and specific provincial initiatives. While this Strategy is being developed, interim action is being taken, including the promulgation of O. Reg. 60/08, and funding of up to $850K for studies and pilot projects to begin to address non-point source discharges of phosphorus. This Strategy and any policies/legislation dealing with the protection of Lake Simcoe will be reviewed in future ECO Annual Reports once decisions are posted on the Registry. It should be noted that on June 17, 2008, Bill 99, the *Lake Simcoe Protection Act* was introduced for first reading.

ECO Comment

The ECO is pleased that MOE is taking action to protect Lake Simcoe by passing this regulation and recognizes that this is an interim measure while the government develops a comprehensive framework to provide for the long-term management of phosphorus within the basin. The ECO looks forward to measures in the protection strategy that will address larger contributors of phosphorus (e.g., agricultural sources, urban stormwater, etc.). The ECO notes that there are a number of financially viable options for keeping the future phosphorus loading levels low and some STPs are already planning improvements which would enable this.

The ECO suggests that the actual total phosphorus loads from the STPs should have been documented in the proposal notice. As stated earlier, the STPs discharged a collective total of 5.9 tonnes of phosphorus in 2006. This is lower than the new basin-wide permitted level of 7.3 tonnes/year. Stating this would have made it clearer to the public that this regulation is in fact a cap on phosphorous loading levels, rather than a reduction. Although it is not inaccurate, the statement in the proposal notice that, "the new basin-wide permitted aggregate phosphorus loading for these existing STPs will be 7.3 tonnes/year for the period of the regulation, a reduction in permitted loading of 5.2 tonnes/year for the defined period", could mislead the public to thinking that there will be a reduction of 5.2 tonnes/year. There most likely will be no reduction in total phosphorus at all. The ECO encourages MOE to closely monitor total phosphorus levels in the lake to determine whether the regulation will need to be extended beyond March 31, 2009, and/or whether additional restrictions need to be applied. It would be highly undesirable to allow expansion to the limit, particularly given the high amount of soluble phosphorus in the discharge from STPs.

The ECO is also concerned that there is no definition of what would constitute "temporary relief from complying with a total phosphorus discharge limit specified in the approval...." If this situation does occur, it should be posted on the Registry as an information notice. Because this amount of phosphorus will not be calculated when determining whether the plant has complied with the regulation, it is important for the public to know how much phosphorus was actually discharged as opposed to what was permitted to be discharged.

The ECO will continue to monitor progress on the development and implementation of a protection strategy and legislation for Lake Simcoe.

Review of Posted Decision:

4.14 Federal/Provincial Environmental Assessment Coordination: A Guide for Proponents and the Public

Decision Information:

Registry Number: PA06E0008	Comment Period: 90 days
Proposal Posted: October 31, 2006	Number of Comments: 9
Decision Posted: June 20, 2007	Decision Implemented: June, 2007

Description

On June 20, 2007, the Ministry of the Environment (MOE) approved the "Federal/Provincial Environmental Assessment Coordination in Ontario: A Guide for Proponents and the Public" (the "Guide".) The purpose of the Guide is to help proponents and the public understand when and how EA processes for projects subject to both the *Canadian Environmental Assessment Act* (*CEAA*) and the provincial *Environmental Assessment Act* (*EAA*) should be coordinated. According to the Guide, proponents will be able to prepare one set of documentation and follow one public consultation process, and both governments will agree to follow a similar timeline for decision-making. The Guide assists with the implementation of the Canada-Ontario Agreement on Environment Assessment Cooperation (the "Agreement") that was signed on November 1, 2004, in which both governments agreed to coordinate their activities on projects that are subject to both *CEAA* and *EAA* requirements.

Background:
EA processes are a means of determining whether certain types of developments or infrastructure projects including roads, waste management and energy projects, which have the potential for environmental impact, should be allowed to proceed, proceed with conditions, or in some cases, not proceed at all. Proponents seeking approvals and some EA practitioners have often complained that complying with both the federal and provincial EA processes was overly burdensome, duplicative and procedurally complicated. Further, there has been a great deal of uncertainty concerning the timing and outcomes of EA processes.

An *EAA* amendment in 1996 granted the Minister of the Environment the authority to "vary or dispense with a requirement imposed under this Act with respect to the undertaking in order to facilitate the effective operation of the requirements of both jurisdictions." This amendment led to the signing of the 2004 Agreement with the federal government.

In spring 2004, MOE announced that it would establish an advisory panel of expert practitioners of Ontario's EA processes. The advisory panel was asked to make recommendations on provincial EA processes in general and on how they apply to projects in the waste, transportation/transit and green energy sectors, in particular. EA practitioners advised the panel that there was a "continuing lack of clarity regarding joint assessments under the *EAA* and the *CEAA*" and that "there may still be considerable overlap in jurisdictional authority." In its final report, the advisory panel recommended that MOE develop guidance material on coordinated EAs, stating that "MOE should develop, with proponent and EA participant input, clear and concise guidelines that explain when and how the *EAA* will be harmonized with *CEAA* in relation to undertakings that are potentially subject to both statutes."

In addition to this Guide, codes of practice for preparing and reviewing the terms of reference, public consultation and mediation aspects of the provincial *EAA* have been approved. For the ECO's review of these three codes, refer to section 4.15 of this Supplement. Codes of practice for the preparation and review of individual EAs; and preparing, reviewing and using Class EAs, have been posted on the Registry (number 010-1259) but have not been approved as of August 2008.

Overview of the Guide:
The Guide provides direction to proponents who are planning projects that require a federal screening and a:

- provincial individual EA as stipulated in Part II of the *EAA*; or,
- provincial Class EA process or environmental screening process in accordance with the Electricity Projects Regulation (O. Reg. 116/01)." (For the ECO's review of this regulation, refer to our 2001-2002 Annual Report, pages 89-91.)

Only about 10 per cent of provincial EA projects, i.e., about 10-15 projects per year, follow the provincial individual EA process and only some of these projects are subject to the requirements of the *CEAA*. The Agreement requires that only projects that are subject to both a federal screening and a provincial individual EA follow the coordinated EA process.

Ninety per cent of provincial EA projects follow one of the ten approved Class EA processes that have been developed for projects with known and predictable effects that MOE believes can be managed and mitigated. A Class EA is a self-assessment process that does not normally involve the Environmental Assessment and Approvals Branch (EAAB) of MOE. EA requirements for waste and energy projects are similar to those in Class EAs except that they are outlined in O. Reg. 116/01 and O. Reg. 101/07, respectively. Although the Agreement does not require proponents of these types of EA projects to follow the coordinated EA process, proponents are expected to contact the federal Environmental Assessment Agency to discuss coordination, according to the Guide. The Guide also does not apply to EA projects that are subject to provincial Declaration Orders.

The Guide outlines the coordination roles and responsibilities of the federal and provincial governments. Under the Agreement, the EAAB is responsible for the administration of coordinated EAs for projects on provincial lands.

As described in the proposal notice, the purpose of the Guide is to:

- Help proponents understand and meet the requirements of both federal and provincial environmental assessment legislation.
- Inform the public about environmental assessment process requirements for projects subject to both federal and provincial environmental assessment legislation.
- Assist proponents in avoiding duplication and overlap, costly delays and uncertainty.
- Clarify the roles and responsibilities of parties involved in a coordinated environmental assessment.

- Promote transparency of government involvement and the decision-making process.

The Guide describes "federal-provincial coordination" as:

- a "cooperative, common sense approach to coordinating two EA processes";
- the application of both governments' EA legislation;
- an approach to obtaining the type and quality of information needed to meet federal and provincial EA requirements; and
- a process where each government makes its own decisions, but coordinates timing with each other.

The Guide clarifies that "federal-provincial coordination" is not the use of one piece of legislation to satisfy both federal and provincial requirements. It is also not the use of the "lowest common denominator" to meet EA obligations.

For projects that follow the provincial individual EA process as spelled out in Part II of the *EAA* (sub-section 5-12.4), the Guide provides advice on preparing terms of references, project descriptions, scoping documents, public consultation and EA reports that should result in a "single body of documentation on environmental effects, where appropriate, that satisfies both federal and provincial EA requirements". Both governments have agreed to review and comment on the documents at the same time, and to announce their decisions in "roughly the same time frame." The Guide also includes advice on public consultation and preparing documentation for any other EA projects administered as coordinated EAs.

Implications of the Decision

The Guide implements the Agreement made November 2004, that gave legal authority to using a coordinated approach to meeting the requirements of the federal and provincial EA legislation. The Guide clarifies what is meant by a "coordinated approach" and the roles and responsibilities of all participants. Over the next few years, participants in coordinated EAs will have an opportunity to "test" the Guide and determine whether or not the anticipated benefits of coordinated EAs have been achieved.

As a result of the requirement for the federal and provincial governments to review the Agreement in 2008, MOE may be required to revise the Guide.

Public Participation & *EBR* Process

The proposal was posted on the Registry on October 31, 2006, for a 90-day comment period during which MOE received nine comments from representatives of the federal, provincial and municipal governments, all of whom had experience with EAs. Many of the comments were suggestions on how the Guide should be clarified or were a series of questions for MOE. Some commenters pointed out inconsistencies between the federal and provincial EA requirements, and with current practices that should be reflected in the Guide. In addition, a couple of commenters were concerned about time frames. Although commenters were generally supportive of the proposed Guide, some were concerned that the EA process and advice could vary significantly between one coordinated EA and another.

In response to the comments, MOE made several revisions to the Guide. Text was added to clarify that the more stringent requirements of either jurisdiction would apply in a coordinated EA. In other words, proponents are expressly discouraged from using the "lowest common denominator" approach. This policy was established to clarify which process should be followed when there is duplication between federal and provincial EA processes. MOE also clarified when the coordination of provincial and federal environmental assessments is mandatory and when it is optional. In addition, MOE extended the time frame within which the federal and provincial governments have to review and comment on a proponent's project description from two weeks to 30 days.

Some of the issues raised by commenters that were not explicitly dealt with through revisions to the Guide included:

- The need for a clearer differentiation of the responsibilities of the EAAB and the federal government;
- Concerns that the definitions of some terms in the Guide were not identical to those in the *EAA*;
- The relationship of these documents to other ministry EA guidance documents;
- Concerns that other EA documents may need to be revised to reflect process descriptions in this Guide;
- The need for more guidance for effective public participation from Aboriginal communities; and
- The need for further clarification on the use of federal EA documentation to backup an elevation request at the provincial level.

SEV

MOE explained that aspects of the decision were compatible with the ministry's SEV Environmental Protection principle since environmental assessment is an upfront planning tool used to ensure that proponents consider all aspects of the environment during the planning and development of a proposed project. In addition, MOE noted that the Guide informs the public about participating in a coordinated planning process, thereby ensuring that the environment is protected through avoidance and/or appropriate mitigation. For its Ecosystem Approach principle, MOE explained that proponents must identify potential environmental impacts, including the interrelationship among environment, economy and society in the assessment of alternatives. For its Resource Conservation principle, MOE noted that these issues are taken into account through the proponent's consideration of feasible alternatives during the environmental assessment process.

Other Information

In 1993, the Canadian Council of Ministers of the Environment (CCME) agreed that harmonization of environmental management, including minimization of overlap and duplication of federal and provincial programs, was a top priority. The Canada-Wide Accord on Environmental Harmonization and Sub-Agreement on Environmental Assessment were signed by the CCME (with the exception of Quebec) in January 1998. The Sub-agreement had the following objectives:

1.1.1 To ensure that the environmental effects of proposed projects are carefully considered before decisions are taken by governments.
1.1.2 To achieve greater efficiency and the most effective use of public and private resources…through a single environmental assessment and review process for each proposed project.
1.1.3 To establish accountability and predictability by delineating the roles and responsibilities of the federal, provincial and territorial governments.

The Sub-agreement outlined requirements for the content of the EA, public participation, designation and responsibilities of the lead party for each proposed project. Under the Sub-agreement, proponents were required to consider identifying and evaluating the "direct, indirect, cumulative and transboundary effects of the proposed project" and alternative means of carrying out the project. For public projects, the Sub-agreement required proponents to consider identifying and evaluating "alternatives to the proposed project" and led to the signing of the bilateral agreement "Canada-Ontario Agreement on Environment Assessment Cooperation" on November 1, 2004.

ECO Comment

The ECO regards the idea of the provincial and federal governments coordinating environmental assessment processes as sensible. A coordinated approach to meeting EA documentation and public consultation requirements is a more efficient and potentially more effective approach to meeting EA requirements. Although the federal and provincial EA processes have the same overall goal of promoting good environmental planning and use similar approaches, there are significant differences as well. These make it difficult to truly effect a coordinated approach and to document in a Guide. Regardless, the ECO believes that the Guide is a useful first step towards implementing the coordinated EA process, in the absence of other relevant guidance documentation.

Although EA practitioners were generally supportive of the Guide, they were also confused. The Guide outlined processes that were inconsistent with their experiences or with provincial or federal requirements, or were silent on matters relevant to their projects. They also had many questions and suggestions, many of which were not addressed in the final version of the Guide. The feedback from EA practitioners suggests that the Guide does not provide "clear" guidelines as recommended by the advisory panel. The ECO urges MOE to closely monitor the use of the Guide and to revise it, if necessary, to ensure that the original objectives are achieved.

Although the Guide outlines MOE's expectations related to many aspects of the EA process, it was not intended to address the myriad of concerns regarding provincial EAs. As a result, the Guide does not advance provincial EA reform except within the narrow confines of coordinated EAs. The ECO discusses the need for significant EA reform in Part 2.2 of this year's 2007-2008 Annual Report.

Review of Posted Decision:

4.15 Codes of Practice for Ontario's Environmental Assessment Process

Decision Information:

Registry Number: PA06E0009	Comment Period: 90 days
Proposal Posted: October 31, 2006	Number of Comments: 48
Decision Posted: June 20, 2007	Decision Implemented: June, 2007

Description

On June 20, 2007, the Ministry of the Environment (MOE) approved three Codes of Practice that provide guidance to proponents and the public on the environmental assessment (EA) process: preparing and reviewing Terms of Reference (ToR), consultation and mediation. Despite numerous amendments to the *Environmental Assessment Act* (*EAA*), proponents have described EA processes as overly burdensome, costly, sometimes duplicating other permitting and approval processes, and procedurally complicated. In addition, the public has been frustrated with the quality of the public consultation during the EA process. The three Codes that are the subject of this review address some of these concerns, and according to MOE, "provide clear provincial direction" on the EA process and "increase transparency and accountability, and reduce timelines for the preparation and review of EAs."

Background:
The purpose of the *EAA* is the "betterment of the people ... by providing for the protection, conservation and wise management in Ontario of the environment." EAs are a means of determining if some types of development and infrastructure projects, called "undertakings", that may have an environmental impact should proceed, proceed with conditions, or not proceed at all. The *EAA*, which was passed by the Ontario legislature in 1975, outlines requirements for planning and preparing EAs, including content requirements. The Act applies to public sector proponents and certain private sector projects. The Act requires that certain EAs include a description of the undertaking, rationale for and alternatives to the undertaking, and actions that will be taken to prevent or mitigate the environmental impacts of the undertaking. The *EAA* also includes public consultation, mediation and approval requirements.

Under the *EAA*, proponents are required to follow one of two processes depending on the nature of their projects. Proponents of projects that are carried out routinely and have predictable environmental impacts that can be readily managed can follow one of the approved Class EA processes. Currently, MOE has approved Class EAs (sometimes called "parent" Class EAs) for ten types (classes) of projects. In general, as long as proponents follow the standardized planning process set out in the Class EA, they do not require MOE approval. Alternatively, proponents can follow the individual EA process, which requires proponents to obtain MOE approval before proceeding with their projects.

In 1996, the government amended the *EAA*, significantly changing how EAs are planned and what they must contain. The 1996 amendments included two provisions, section 6.1(3) and section 14(3), that allows proponents to prepare "scoped" EAs, which are EAs that do not include all of the EA content elements prescribed in the *EAA*. The Act does not provide any specific direction on which elements can be "scoped" out of an EA or which elements must be included. Prior to the 1996 amendments, proponents subject to the individual EA process were required to discuss rationale (need) and alternatives to their undertakings in their EAs. After the 1996 amendments, proponents, subject to MOE's approval, were no longer required by the Act to discuss these core EA elements. According to MOE, scoped EAs are more direct and should require less time and money to prepare.

The 1996 amendments also made it mandatory for proponents subject to the individual EA process to prepare ToRs for MOE approval. Proponents of undertakings that follow the Class EA process are not required under the *EAA* to prepare ToRs since they were approved when the "parent" Class EA was approved. ToRs set out the framework for the planning and decision-making processes that proponents will follow during the preparation of their EAs. ToRs are work plans for what will be studied. Proponents that plan to scope their EAs are required to identify in their ToRs the elements that will be scoped out. The *EAA* does not identify what must be included in a ToR, although the question has been the subject of several court judgements.

The 1996 amendments also made public consultation during the preparation of the ToR and the EA mandatory. Proponents are responsible for determining who will be consulted, and when and how they will be consulted. In addition, the Minister of the Environment was given the authority to refer unresolved issues to mediation before the Minister approves the ToR, the EA or a "bump-up" request (Part II Order), or before the Environmental Review Tribunal approves the EA.

MOE announced in the spring 2004 that it was establishing an advisory panel of expert practitioners of Ontario's EA processes. MOE asked the advisory panel to make recommendations on EA processes in general and on how these processes should apply to projects in the waste, transportation/transit and green energy sectors, in particular. In its final report, the advisory panel made 41 recommendations that together are an "integrated reform package which should not be implemented in a piecemeal or disjointed manner." In response to the report, the government released its plan for EA improvements to the public in June 2006. One of the components of the plan was the development of six codes of practice, including the three Codes reviewed herein and the "Federal/Provincial Environmental Assessment Coordination in Ontario: A Guide for Proponents and the Public" that is reviewed in section 4.14 of this Supplement. The remaining two codes, the preparation and review of individual EAs; and preparing, reviewing and using class EAs, have been posted on the Registry (number 010-1259) but have not been approved as of August 2008.

Also in 2006, the ECO received an application under the *EBR* requesting a review of the *EAA* provision, section 6.1(3), that allows EAs to be scoped. According to the applicants, the current wording is vague and subject to interpretations that undermine the purpose of the *EAA*. The applicants believe that the scoping provision should be strengthened. Although the ECO agreed with MOE's decision to decline the application under the rules of the *EBR*, the ECO also agreed with the applicants that the scoping provision requires amending. For the ECO's review of this application, refer to section 5.2.9 in this Supplement.

Code of Practice: Preparing and Reviewing ToRs (the "ToR Code"):
ToRs have been the subject of much criticism. Many members of the public have confused ToRs with the actual EAs and have complained that some proponents have obtained MOE approval on ToRs that exempted proponents from having to discuss need and alternatives in their EA documentation. Many people consider "need" and "alternatives" core elements of an EA. In 2006, the advisory panel also considered these elements important and recommended that MOE provide clearer guidance on ToRs,

and in particular, when and how proponents are to demonstrate need and identify alternatives for public versus private projects and for green projects. The advisory panel also advised that MOE "should narrowly prescribe those circumstances where the Minister may limit or scope the consideration of need and alternatives to."

The ToR Code sets out MOE's expectations for the preparation of a ToR for proponents that are following the individual EA process. The ToR Code outlines the roles and responsibilities of EA participants and the steps to follow during the preparation of a ToR. The ToR Code explains that the *EAA* sets out the generic elements of an EA, but that the Minister of the Environment can agree that some of these requirements are not necessary, sometimes called "scoping", as long as the EA submitted for approval is consistent with the overall intent of the *EAA*. The ToR Code advises proponents that the scoped EA elements "should not differ drastically from the generic elements." However, since some proponents may be preparing their ToRs before the undertaking is defined, the ToR Code explains that proponents need only include a preliminary description of and the rationale (need) for the undertaking, if they are known. If they are not known, proponents need to only make a commitment in the ToR to include a description of and rationale for the undertaking in the EA. The ToR Code encourages proponents to build flexibility into their ToRs so that they can "adjust aspects of their proposal without having to start the process over again." ToRs must be followed and cannot be amended after they are approved by the Minister.

The ToR Code also explains that the ToR must "set out a reasonable range of alternatives" to be examined in the EA or "the process by which a reasonable range of alternatives will be determined." It explains that the term "alternatives" includes alternatives to the undertaking and alternative methods of carrying out the undertaking. According to the ToR Code, proponents should choose alternatives that address the purpose of the project, including the "do nothing" alternative. However, proponents do not need to repeat prior planning work if alternatives were previously considered in a manner that was consistent with the *EAA*. The ToR Code includes a list of 11 questions that proponents should consider when they select alternatives, and notes that proponents need consider only alternatives within their ability to implement. For example, proponents do not need to consider alternatives that require expropriation of land if they have no authority to expropriate land.

The ToR Code also outlines MOE's expectations regarding public consultation on the ToR, and submission of the ToR to MOE for approval. Under the Deadlines Regulation (O. Reg. 616/98), the Minister of the Environment's decision is due at the end of 12 weeks. If the Minister believes that there are outstanding issues, the Minister may refer the matter to mediation; otherwise, the Minister is required to approve the ToR, approve it with amendments or reject it.

Code of Practice: Consultation in Ontario's Environmental Assessment Process (the Consultation Code): The Consultation Code provides guidance and direction about consultation requirements during the planning, review and approval phases of an EA. The Code explains the roles of proponents, the public, other interested persons, Aboriginal peoples and other government agencies in projects following either the individual or Class EA process.

Over the years, the public has raised numerous concerns about public consultation, citing examples of proponents failing to provide appropriate project documentation ahead of time and failing to consult all "interested persons", lack of notification of consultation events and failing to address concerns raised during the consultation. Although the *EAA* requires that proponents consult with "interested persons," it provides very little direction on whom and how to consult. Noting this lack of direction, the advisory panel recommended that MOE identify "interested persons" within the meaning of the *EAA*; and require that the public be notified in a timely and effective manner, have access to EA documentation and adequate time to comment. The advisory panel also recommended that MOE outline appropriate methods of obtaining public input and addressing concerns, and advise proponents that appropriate resources must be made available to the public. In addition, the advisory panel made several recommendations regarding First Nations and Aboriginal community participation in the EA process.

The Consultation Code explains that consultation is two-way communication between proponents and interested parties including the public and Aboriginal peoples and is a key aspect of the EA process. The

Consultation Code outlines mandatory requirements for notifying the public of EA milestones and of opportunities to consult. It also notes that proponents must make "relevant project information" available to the public before the consultation event. The Consultation Code discusses the principles and methods of effective consultation and elements of a good consultation plan. It also warns proponents of potential consequences of an inadequate consultation process and provides advice on how to respond to concerns.

Code of Practice: Using Mediation in Ontario's Environmental Assessment Process (the Mediation Code): According to the advisory panel, the lack of an MOE policy on mediation may be one of the reasons why the Minister of the Environment has never requested formal mediation for any undertakings since being granted the authority in 1996. The advisory panel was of the opinion that alternate dispute resolution (ADR) including mediation should be used extensively throughout the EA program and that MOE should be encouraging its use. The advisory panel recommended that MOE consider the circumstances under which ADR should be used, and consider a mandatory one-day mediation session at the end of contentious phases.

The Mediation Code explains how mediation can be used to resolve contentious issues that may arise in any type of EA. It describes how the mediation provisions in the *EAA* are to apply during the planning of an undertaking and explains that the term "mediation" refers to a range of dispute resolution techniques used to resolve disputes with the assistance of the mediator, a neutral third party. The Mediation Code explains that a mediator can help the parties achieve a mutually acceptable and good faith solution to a dispute, but that a mediator cannot impose a settlement on the parties who maintain full control over the resolution of the dispute.

The Mediation Code outlines two types of mediation, self-directed and referred, and explains when each type should be considered. It discusses how a proponent can use self-directed mediation to resolve disputes during the consultation phase of an individual EA, Class EA or an environmental screening. The Mediation Code also describes how the minister may promote dispute resolution by referring unresolved issues to mediation before a decision is made about a ToR, an EA, a request for a Part II Order (request for an individual EA) or a elevation request for a waste or an electricity project. It also describes how members of the public or agencies with outstanding environmental concerns may make a written request to the Director to elevate a project to an individual EA.

The Mediation Code explains how to determine if mediation is appropriate, how to identify the parties, and how to select a mediator. It also includes a mediator's toolkit and flowcharts that outline the use of mediation in several types of EA processes and the mediation process. The Mediation Code also provides guidance on what the mediator's report should and should not contain.

Implications of the Decision

According to MOE, only about 10 – 15 individual EAs are undertaken or active in any given year; whereas there are thousands of class EA projects annually. The ToR Code is relevant only to projects preparing individual EAs; whereas the other two Codes can be applied to any type of EA. Predicting the impact that these Codes will have is difficult. Although the Codes should help participants understand the EA process, it is not readily apparent that the Codes include any specific changes that make the EA process more effective or efficient. MOE is assuming that more knowledgeable EA participants will result in a better understanding of the EA process, better quality EA documentation and public consultation, and fewer contentious issues, which will result in faster and better approvals.

Public Participation & *EBR* Process

MOE posted the proposal on the Registry on October 31, 2006 for a 90-day comment period during which it received 48 comments. Almost half of the comments on the three Codes were from representatives of the federal, provincial and municipal governments who had experience with EAs. However, three quarters of the comments on the Consultation Code were from the public, many of whom had participated in EAs for wind power projects.

In response to a comment that definitions be made consistent across the draft various Codes of Practice, MOE ensured that this was completed. Also, MOE modified terms like "interested persons", "participants", "parties" and "interested parties" to make these clearer and more distinct. However many comments were not explicitly incorporated in the Codes.

Code of Practice: Preparing and Reviewing Terms of Reference (ToR) for Environmental Assessments in Ontario:
Several commenters suggested that the language used in this Code be strengthened to provide greater clarity and direction. One commenter noted that the Code was too flexible in some cases and not enough in other cases. Commenters also requested that MOE clarify the requirements of the planning process, the role of consultation in the process and the proponent's responsibilities in that regard. In its decision notice, MOE wrote that, where possible, the Code was strengthened by replacing the verb "should" with "will" and "must" but noted that flexibility is required to accommodate changes in circumstances. The ministry indicated that proponents need flexibility at this initial stage since the document cannot be amended after it has been approved by the Minister of the Environment. MOE advised commenters that the final Code appropriately reflected where flexibility was needed, and where it should be avoided. In addition, MOE asserted that the ToR Code provides greater clarity about consultation responsibilities of all persons involved in the EA process, including the proponent.

One commenter suggested that the ToR Code should discuss what methodologies proponents are to use to evaluate alternatives. MOE advised that, since the EA process is proponent-driven, the choice of evaluation methodology is the proponent's responsibility. MOE added that the choice of methodology is subject to review by all interested persons and the ministry.

Commenters raised two issues related to timelines. First, specific timelines in parts of the EA process, e.g., for reaching milestones and scheduling consultation events, are required. Second, the timelines for review of documents should be longer. MOE explained that the ToR Code encourages proponents to allow more time for reviewing drafts for proposed undertakings that are complex or have generated much public interest. However, MOE noted that the proponent must prepare the EA according to the timeline that it outlined in its ToR. MOE explained that, after the ToR is submitted to MOE for approval, the public is given a minimum of 30 days to provide comments, and that it must comply with the Deadlines Regulation (O. Reg. 616/98), which limits the amount of time given for the ministry's review of, and decision on, the ToR.

Code of Practice: Consultation in Ontario's Environmental Assessment Process:
A commenter noted that, for some undertakings, it can be very difficult to determine potentially affected persons and to map "the location of the proposed undertaking and affected persons within the notification/consultation distances." In response, the ministry removed the requirement in the Consultation Code for a map of the study area, and the requirement to notify all persons in the study area and within a 500-metre radius of a proposed site-specific project. MOE explained that this takes into account projects that may be of interest to all Ontarians such as broad transportation planning studies that cover a large geographic area, not just projects in a specific geographic area.

Some commenters wrote that having all EA documents available prior to a consultation event was too onerous. MOE responded by amending the Consultation Code to require the proponent to "make available for review, relevant project information before a planned consultation event."

A concern was raised about a proponent's ability to identify and meaningfully respond to First Nations issues. Commenters suggested that MOE provide clearer advice in the Consultation Code to proponents about who to consult, to what degree, and how to factor in the Crown's duty to consult. MOE responded that the sub-section on identifying Aboriginal communities clearly sets out the requirements. Proponents are expected to identify and consult with Aboriginal communities that may be potentially affected by, or interested in an undertaking. Furthermore, for proponents that also act as the Crown, wording has been added to reflect that an Aboriginal community may be an interested person for the purposes of consultation during the preparation of an EA, including a ToR, whether or not the Crown has a constitutional duty to consult with an Aboriginal community. MOE reported that it had added wording concerning the roles of Aboriginal peoples in the EA process.

A commenter suggested that proponents consider translating their EA documents into various languages, particularly Aboriginal languages, in order to improve EA participation. MOE added the point to the Code that proponents may wish to translate EA documents into other languages depending on the cultural composition of the local community.

Commenters requested clarification of the factors used to determine the consultation requirements described in the draft Code. Commenters also asked MOE to provide greater clarity and consistency with the Provincial Policy Statement and to include cultural heritage as a consideration in EAs. MOE advised that the Consultation Code had been changed to reflect that increasing public concern is a factor in determining public consultation activities. In addition, wording about the cultural heritage environment was added to the Code to ensure that EA participants are aware of the need to identify and address potential effects associated with that component of the environment. MOE noted also that a new appendix has been included to identify key ministries and government agencies that should be notified of a proposed undertaking.

A commenter asked MOE to clarify how the document is to be interpreted. MOE responded by adding more tip boxes throughout the Consultation Code to emphasize how the Code is to be interpreted and to provide supplementary information about key matters and processes.

Wind Turbines:
Many of the comments on the Codes from the public were from individuals who had participated in various wind farm projects. They advised that:

- Promises by proponents and their representatives to respond to questions from the public had not been honoured.
- Proponents had not advised nearby residents of public meetings and open houses, and should not be trusted to do so.
- EA notification should be in plain language and placed in the news section of the local paper rather than in the want ads.
- Because they were unfamiliar with how to participate in an EA, they missed or had to scramble to meet opportunities to participate.
- Delays in obtaining access to project documentation, which can be several hundreds of pages long, meant that members of the public have far less than 30 days to review and submit their comments.
- Review periods for large documents should be 90-120 days.
- Projects were expanded in size and/or location after they were presented to the public.
- The Environmental Assessment and Approvals Branch (EAAB) of MOE does not independently verify that the proponent has addressed the public's concerns.
- The EAAB is only checking that EA documentation looks complete before it approves the EA. Factual information is not checked for accuracy and completeness. Commenters noted that they found numerous errors in material submitted by proponents for EAAB approval.
- MOE should prepare guidance materials specifically for wind power projects.
- MOE should host a website on which proponent materials, comments and other documentation can be posted.

MOE advised that comments relevant to the Codes were considered and that comments specific to wind farms would be considered during its review of the O. Reg. 116/01, The Electricity Projects Regulation.

Code of Practice: Using Mediation in Ontario's Environmental Assessment Process:
Several commenters expressed concern about the use of mediation and its value when there is a fundamental difference of opinion. MOE concurred, noting that experts in mediation hold the same view. In response to another comment about the use of mediation – that MOE might impose it upon parties –

MOE replied that it would not do so if parties are not willing to participate. A commenter noted that the mediator should ensure that the issue to be resolved is clearly identified. MOE agreed and amended the Mediation Code.

Commenters wrote that the Mediation Code was not clear about how mediation applies to Part II Order requests, elevation requests for electricity and waste management projects, and requests for an individual EA under Declaration Order MNR-71 (Forest Management). MOE responded that it had updated the Code related to these matters and included the mediation requirements in O. Reg. 101/07 – The Waste Management Projects Regulation. MOE also advised that the Code was updated to reflect timelines prescribed in O. Reg. 616/98 – (The Deadlines Regulation) in response to a question about whether the Code was consistent with this regulation.

SEV

The ministry advised that this proposal was consistent with its SEV. For its "Environmental Protection" goal, MOE wrote that the Codes will assist proponents with *EAA* requirements; advise the public about how to participate in EA planning processes; and ensure that the environment is protected through avoidance or mitigation. For its "Ecosystem Approach" goal, MOE advised that the Codes promote sound environmental decision-making. For its "Resource Conservation" goal, MOE wrote that these issues are taken into account through the proponent's consideration of feasible alternatives during the EA process.

ECO Comment

Although the ECO has a number of concerns with the Codes and Ontario's EA program in general, the development of these Codes is a positive step towards improving "transparency and accountability" in the EA process. The Codes provide EA participants with a better understanding of the EA process and MOE's expectations regarding the preparation and review of ToRs, public consultation and mediation. The ECO urges MOE to ensure that proponents use the Codes and make them available to the public, and to consider making their use mandatory. In addition, the ECO agrees with MOE and the advisory panel that training of practitioners and public education on the EA program is needed.

Code of Practice: Preparing and Reviewing ToRs:
When the government amended the *EAA* in 1996, MOE assured the government that the amendments would strengthen environmental assessments in Ontario. However, many, including the ECO, believe that the scoping provision in particular, has had the opposite effect. The ECO believes that MOE should approve the use of this provision only when there is compelling evidence that scoped elements have already been addressed through an equivalent process or are clearly not relevant. The ECO believes that the scoping provision in the *EAA* should be amended to provide clearer direction on what and when elements of an EA can be scoped. For additional ECO comments on *EAA* reform and scoping, in particular, refer to Part 2 of the Annual Report and section 5.2.9 of this Supplement, respectively.

In an attempt to satisfy all of the potential EA scenarios, the ToR Code gives proponents considerable discretion in how much detail to include in the ToR. For example, proponents could prepare a ToR that includes a clear and complete description of and rationale for the undertaking, a comprehensive list of the alternatives to be discussed in the EA and a commitment to discuss all of the mandatory EA elements prescribed by the *EAA*. Or, proponents could prepare a ToR that merely sets out processes that will deliver an EA that is consistent with the Act without describing the undertaking, except in conceptual terms, and without a rationale or a list of alternatives to the undertaking. In the ECO's opinion, such a ToR fails to demonstrate how the proponent will meet the intent and the requirements of the *EAA* and trivializes public consultation on the ToR. Without an understanding of the undertaking, the need and alternatives to the undertaking, and the elements to be included in the EA, the public cannot provide meaningful comment on the ToR. Providing this information only after the EA has been drafted means that the legitimate concerns of the public are unlikely to be resolved satisfactorily and may result in unacceptable delays to the proponent.

The ToR Code also fails to "narrowly prescribe those circumstances where the Minister [of the Environment] may limit or scope the consideration of need and alternatives to" as recommended by the advisory panel. The ToR Code does identify a few circumstances that can limit a proponent's ability to consider need and certain alternatives. It also notes that work done on need and alternatives under other planning processes can be used. However, the ToR Code does not describe circumstances or even criteria that the Minister should consider when making a decision regarding scoping of need and alternatives or other mandatory elements of an individual EA. The limited direction on scoping in the ToR Code is unlikely to provide the clarity that the advisory panel and the public seek. The ECO believes that scoping will remain a contentious point in the EA process, unless MOE makes substantive revisions to the ToR Code and strengthens the scoping provision in the *EAA*.

Code of Practice: Using Mediation in Ontario's Environmental Assessment Process:
Although the government introduced the mediation provisions in the *EAA* in 1996 with the obvious belief that mediation was a useful tool, it has not been used. The advisory panel also concluded that mediation was a useful tool and attributed, at least in part, its lack of use to the lack of guidance material. The ECO believes that the Mediation Code is a useful first step towards encouraging proponents and MOE to use mediation more frequently.

The ECO notes that the Mediation Code does not include the advisory panel's recommendation that the government consider the use of mediation at the end of contentious phases of an EA project and before a bump-up or elevation request is decided. The Mediation Code indicates that mediation can be requested, but not that it must be considered, before a bump-up or elevation request is decided, and is silent on the use of mediation at the end of contentious phases.

Code of Practice: Consultation in Ontario's Environmental Assessment Process:
The purpose of the *EAA* is the "betterment of the people of the whole or any part of Ontario." Equally important to considering the need and alternatives to the proposed undertaking during an EA is the requirement to consult with the public. However, as noted by the advisory panel, the *EAA* provides little direction on whom and how this should be done. As a result, the advisory panel had a long list of recommendations for MOE to consider while it developed the Consultation Code.

The Consultation Code does provide useful guidance and direction on consultation, including how to prepare a consultation plan. However, MOE faced the same challenges preparing this code as it did the other codes in having to consider a wide range of EA scenarios. As a result, the Consultation Code is often vague on important details. The advisory panel recommended that MOE consider the importance of timely notification, availability of documentation and information, and adequate comment periods for public consultation. The public has often complained about the lack of and ineffective notification, the lack of and incomplete documentation and inadequate comment periods. However, MOE weakened the notification requirements for public consultation and provision of EA documentation for public review in the approved version of the Consultation Code in response to comments from some proponents. The Consultation Code does state that two weeks notification of a public consultation event must be given in the local newspaper, but no such requirement applies to any other notification method. In addition, the Code does not state how long documentation about the undertaking must be available before the consultation event nor does it describe what constitutes appropriate documentation. With the exception of specifying that the comment period on the proposed ToR is 30 days and on the proposed EA is seven weeks, the Consultation Code does not specify minimum comment periods for any other public consultation that the proponent may conduct. All of these details are at the discretion of the proponent. The ECO believes that MOE should have provided stronger guidance on these matters.

Summary:
The three Codes are a good first step to improving our understanding of EA processes, requirements and practices. However, in order to accommodate "all" scenarios, the Codes contain numerous caveats, conditional statements, and exceptions that give MOE and proponents considerable discretion in what they do and how they do it. As a result, the Codes are not sufficient to compensate for weaknesses in the *EAA*, nor do they materially change the existing flawed practices or advance EA reform. Part 2 of the

2007-2008 Annual Report describes some of these weaknesses and flaws and discusses why significant EA reform is still required to restore public confidence in the EA process.

Review of Posted Decision:

4.16 Canada – Ontario Agreement Respecting the Great Lakes Basin Ecosystem

Decision Information:

Registry Number: PA07E0001	Comment Period: 30 days
Proposal Posted: January 19, 2007	Number of Comments: 35
Decision Posted: March 16, 2007	

Decision Information:

Registry Number: 010-0063	Comment Period: 58 days
Proposal Posted: June 12, 2007	Number of Comments: 33
Decision Posted: August 14, 2007	Came into Force: June 25, 2007

Description

In January 2007, the Ministry of the Environment (MOE) posted a proposal on the Environmental Registry seeking comment on the Governments of Ontario and Canada working together to renew the *Canada – Ontario Agreement Respecting the Great Lakes Basin Ecosystem* (COA) for a three-year term with possible changes to its Annexes. In June 2007, MOE posted the draft of the 2007 COA for public comment. COA sets out how Ontario will work with Canada to implement commitments made under the Canada-U.S. *Great Lakes Water Quality Agreement* (GLWQA).

The Great Lakes are an integral part of Ontario and Canada. Together they contain 20 per cent of the globe's surface fresh water, and host a diverse ecosystem that supports a wide array of wildlife and vegetation. Over half of Canada's 444 species at risk reside in the Great Lakes Basin. The basin is also home to approximately 40 million people, including 30 per cent of Canada's population and 10 per cent of the United States population. The area plays a vital role for the economy and supports over 50 per cent of Canada's manufacturing output, 25 per cent of Canada's agriculture and over $330 billion annually in Ontario-U.S. Trade.

As discussed in the ECO's 2005-2006 Annual Report, unsustainable development and industrial pressures threaten the Great Lakes Basin's ecological health. Population growth, urbanization and industrialization have resulted in critical pollution problems and has destroyed vital habitat, which has led to the decline of native wildlife and fish species and a deterioration of water quality. More recent stressors for the Great Lakes include the release of untreated sewage by Canadian and U.S. cities, climate change causing higher evaporation rates and lower lake and river levels, the growing presence in waterways of pharmaceuticals and personal care products (which are not removed by sewage treatment), and the spread of invasive species that damage the ecosystem or outcompete native species.

Great Lakes Water Quality Agreement:
To address environmental stressors of the time and attempt to reverse the degradation of the Great Lakes, Canada and the United States signed the *Great Lakes Water Quality Agreement* (GLWQA) in 1972 and last revised it in 1987. The two nations committed to controlling pollution and cleaning up wastewaters from industries and communities in the Great Lakes Basin. In 1978, Canada and the U.S. signed a renewed agreement that pledged to eliminate persistent toxic pollutants from the Great Lakes. It was followed by the 1987 Protocol, which emphasized the importance of human and aquatic ecosystem health, and introduced Remedial Action Plans (RAPs) for 43 Areas of Concern (AOC), Lakewide

Management Plans (LaMPs), and Annexes that focused on non-point contaminant sources, contaminated sediment, airborne toxic substances, contaminated groundwater, and associated research and development.

In February 2008, Herb Gray, the Canadian Chair of the International Joint Committee (IJC), complained that Great Lakes restoration has not happened. Rather, the condition of the Lakes was worsening and both federal governments were not reacting with the requisite urgency to save this "binational treasure." An IJC 2006 special report called on Canada and U.S. governments to create a more action-oriented agreement with goals, timelines, targets and monitoring and reporting structures. In the February letter to the Canadian government, the IJC urged action on updating the agreement, which was proceeding too slowly.

Canada-Ontario Agreement Respecting the Great Lakes Basin Ecosystem:
The *Canada-Ontario Agreement Respecting the Great Lakes Basin Ecosystem* (COA) was first signed in 1971, in advance of the 1972 GLWQA. It created a framework to implement Canada's commitments under the GLWQA by allocating responsibilities between the Canadian and Ontario Governments to restore, protect and conserve the Great Lakes ecosystem. The Ontario Ministries of the Environment (MOE), Natural Resources (MNR) and Agriculture, Food and Rural Affairs (OMAFRA) are signatories to the agreement and are responsible for Ontario's commitments under COA.

To respond to changes to the GLWQA and Great Lakes priorities, the original COA was revised and renewed in 1976, 1982, 1986, extended in 1991 and renewed in 1994. In 2002, the Governments of Canada and Ontario signed the 2002 COA for a five-year term ending March 2007. Ontario pledged $50 million over the five years towards priority projects including: cleaning contaminated sediment in AOCs; monitoring and reporting of water and sediment quality and the health of fish and wildlife; reducing the flow of harmful pollutants into the Great Lakes; integrating information from both governments and stakeholders to ensure better decision-making; and improving habitat rehabilitation, conservation and protection.

In the fall of 2005, Canada and Ontario launched a review that examined how the 2002 COA was working and how well it was being implemented. The majority of participants surveyed as part of the review felt that COA was making a difference in the Great Lakes; however, they also stressed there was a need for improvement in the way the agreement objectives are implemented. Participants stressed that there was a need for clearer strategic-level direction and leadership around vision, filling gaps between goals and implementation, and fragmented efforts and resources. There was also impatience around the rate of progress in meeting targets. Another issue raised was that key stakeholders with direct links to the outcomes of COA were not parties to the agreement. This includes provincial ministries such as the Ministries of Public Infrastructure Renewal (PIR), Municipal Affairs and Housing (MMAH). There was also a discussion on whether municipalities, conservation authorities, non-government organizations (NGOs) and Aboriginal peoples should be included. A stakeholder engagement strategy was also encouraged. It was noted that the Annexes were narrow and focused primarily on water and needed to be updated and broadened to look at sustainability and address additional serious pressures facing the Great Lakes. One point that was emphasized consistently was the lack of funding and the need to mobilize both public and private resources.

2007 COA:
In early 2007, the Governments of Ontario and Canada began working on the draft 2007 COA. In June 2007, after the 2002 COA had expired, MOE posted a policy proposal notice on the Environmental Registry seeking public comment on the draft 2007 COA. The 2007 COA was signed on August 16, 2007, but came into effect on June 25, 2007.

The 2007 COA is guided by the shared vision of the Parties of a "healthy, prosperous and sustainable Great Lakes Basin for present and future generations." Through its four annexes - Areas of Concern, Harmful Pollutants, Lake and Basin Sustainability, and Coordination of Monitoring, Research and Information – the 2007 COA sets out the priorities and goals for the Great Lakes over the next three years. The agreement also sets out guiding principles and the administrative arrangements for management of the agreement.

As described in greater detail below, the Annexes that accompany the agreement attempt to address many of the issues raised during the consultations held prior to the drafting of the 2007 COA, as well as the comments that came through the Environmental Registry. Issues such as toxic substances, invasive species, sustainability and climate change have been incorporated into the agreement. Outside of the 2007 COA, Ontario has also made commitments and implemented initiatives to address specific issues such as drinking water protection, certain AOCs and climate change. Furthermore, greater involvement of the Great Lakes community has also been recognized by the Governments of Canada and Ontario as an important implementation strategy and they have pledged to engage in this further.

The ECO has followed COA over the years and commented on earlier agreements in past Annual Reports, specifically the reports of 2005-2006, 2002-2003, and 1999-2000. Issues raised in regard to past COAs include: the lack of transparency and accountability of funding and setting priorities and targets; the limited public participation in the negotiation and implementation process; and minimal progress in addressing environmental objectives in the agreement.

Implications of the Decision

The 2007 COA replaced the 2002 COA approximately five months after the latter expired. Its three-year term extends from 2007 to 2010, to correspond with the renegotiation of the GLWQA, which is currently underway. The agreement enables the Governments of Canada and Ontario to work towards restoring, protecting and conserving the Great Lakes Basin ecosystem.

The signing of the 2007 COA is meant to affirm and set out Ontario and Canada's renewed commitment to work together as well as the priorities and tasks each government will undertake to protect the Great Lakes Basin and to meet Canada's obligations under the GLWQA for the next three years. The governments will determine how to pool their resources and funds in order to plan and coordinate the implementation of the initiatives outlined in the agreement.

The goals that the two governments will work towards are found in the four Annexes accompanying the agreement which addresses the priority environmental issues that would benefit from coordinated action by the two levels of government. Each Annex sets out: goals to be achieved for the duration of the agreement; results to be pursued to meet the goals; and the commitments undertaken by each government to achieve the stated goals and results. This work requires the involvement of a variety of local partners in the Great Lakes community including municipalities, conservation authorities, Aboriginal communities, NGOs, academic institutions and business sectors.

The environmental concerns that the agreement aims to tackle include Areas of Concern, invasive species, impacts of climate change, source water protection and sustainable development in the Great Lakes Basin to name a few. These environmental issues are complex. They require serious intergovernmental coordination and funding, as well as strong relationships with local authorities and stakeholders.

Although progress has been realized on several commitments under COA, unless concerns around funding, measurable targets and deadlines, collaboration, transparency and accountability associated with the 2002 COA are addressed, the 2007 COA will achieve minimal results under its three-year term.

Areas of Concern Annex:
The Areas of Concern Annex focuses on 15 AOCs (10 in Canada and five shared Canada-U.S. AOCs), which were designated by the Water Quality Board of the IJC in 1985. The AOCs were selected because they suffer from pronounced environmental degradation or impairment of their aquatic beneficial uses.

Without the clear delineation of responsibilities and funding for specific commitments, and a lack of clear targets and deadlines for achieving commitments, progress on delisting AOCs has been slow and minimal. Since 1987, only two of Canada's original 17 areas of concern have been delisted—Collingwood Harbour (1994) and Severn Sound (2003). One additional area is now classified as an area of recovery. Due to delayed reporting on progress by both the federal and provincial governments, it is difficult to assess to what extent the remaining areas of concerns have been restored.

The costs associated with restoring AOCs are substantial and the responsibilities for many environmental concerns fall under different governmental jurisdictions. For instance, Environment Canada estimates it would cost $150 million to clean up contaminated sediments in AOCs and $2.4 billion to upgrade overloaded municipal wastewater systems. Both these stressors fall under federal, provincial and municipal authorities which necessitates intergovernmental cooperation.

Additionally, the scale and complexity of these goals requires significant investment in order for them to be met. Over the past 15 years, approximately $350 million has been invested by all partners. However, Environment Canada estimates that an additional $3.5 billion is required to clean up significant problems that continue to impair beneficial uses in AOCs. Therefore, remedial actions require both the strategic collaboration and funding by the parties and appropriate stakeholders.

The 2007 AOC Annex does not include AOC delisting as a goal to be completed under this agreement. In comparison, the 2002 agreement aimed to delist two AOCs. Instead, the goals set out in the Annex are to complete priority actions that will lead to the delisting of four AOCs, and to make significant progress towards Remedial Action Plan implementation, environmental recovery and restoration of beneficial uses in the remaining 11 AOCs.

The Annex outlines seven results to be achieved by 2010 in order to meet these goals. The results include large-scale projects such as reducing pollution from municipal, industrial and rural sources; developing contaminated sediment management strategies; and rehabilitating fish and wildlife habitats and populations. However, the commitments made by both levels of government are somewhat vague, small-scale and unlikely to meet the intended goals. The commitments do not clearly specify the role of each level of government or the requisite roles of important stakeholders such as municipalities.

At the time the 2007 COA was signed, the Ontario government committed approximately $32 million to the agreement over its three-year term. At approximately $10 million per year, it is nearly the same per annum amount committed under the 2002 COA. In addition to the funds pledged at the time the agreement was signed, the Governments of Ontario and Canada have allocated extra funds to specific AOCs. For example, in August 2007, Ontario pledged an additional $30 million to clean up Randle Reef in Hamilton Harbour. Hamilton Harbour is listed as an AOC due to contamination from toxic coal tar and heavy metals discharged into the harbour by nearby industries in the 1800s and 1900s. Also in August 2007, Ontario committed $1.5 million to complete the environmental clean-up of the St. Lawrence River at Cornwall. In February 2008, the federal government announced it was investing up to $3.3 million to clean up the St. Clair River as part of Canada's Action Plan for Clean Water. Federal and provincial funding is also used to leverage resources from other partners such as conservation authorities and municipalities.

Harmful Pollutants Annex:
The Harmful Pollutants Annex works towards the virtual elimination of legacy pollutants such as PCBs, mercury, dioxins and furans, benzo(a)pyrene, hexachlorobenzene, as well as ongoing sources of pollution such as wastewater effluents and air pollutants. The Annex takes a substance and/or sector approach to reduce and prevent releases into the basin and seeks to virtually eliminate the persistent bioaccumulative toxic substances (Tier 1 Substances). Its other goals are to reduce other harmful pollutants, and enhance knowledge to reduce releases and mitigate risks. These goals overlap with initiatives undertaken under the AOC Annex and Lake and Basin Sustainability Annex.

The Annex sets out six results. Results such as the reduction of releases of Tier 1 substances and criteria air pollutants have targets associated with them. For example, governments are expected to achieve by 2010, reductions of 90 per cent for dioxins and furans and mercury (1988 baseline); 75 per cent for hexachlorobenzene and 55 per cent for benzo(a)pyrene (1988 baseline). By 2015, reductions of 90 per cent for PCBs (1993 baseline), and a 45 per cent reduction from 1990 levels for both nitrogen oxides and volatile organic compounds are projected. However, it is unclear whether Ontario's commitments under this goal will meet these targets because it is not known how much progress has been made to date. Other targets require coordination between the different levels of government or rely on pre-existing government initiatives to meet the goals. For example, in order to reduce releases from municipal wastewater, Canada and Ontario have committed to work together to establish federal effluent regulations, and to work with municipalities to ensure sewer by-laws are in place and to investigate how to optimize treatment facilities. Absent from the commitments is a significant investment applied towards the actual improvement of the operation of municipal treatment facilities along with timelines for the improvements.

Other results, such as developing a program for the sound management of other chemical substances and understanding their environmental and human health impacts, do not identify specific targets, substances or sources. Most of the work described is consultative, outreach-focused or research-oriented. It is unclear what is the anticipated outcome to be achieved by 2010.

Lake and Basin Sustainability Annex:

The Lake and Basin Sustainability Annex replaces the Lakewide Management Annex of the 2002 COA. This Annex aims to anticipate and prevent environmental problems, and resolve certain current issues. The Annex sets out six goals that promote sustainable management practices and activities to protect important biodiversity areas and aim to restore conditions in priority areas. Greater attention is also placed on stewardship of aquatic resources and on the activities of communities in the Great Lakes Basin. This includes improving the social and economic well-being of humans and the health of Great Lakes aquatic ecosystems; improving water quality by eliminating toxic substances and reducing pollutants; conserving genetic and biological diversity; and responding to the threat of aquatic invasive species.

The Annex addresses two new areas of special focus. The first is the identification and projection of emerging changes to ecosystems and assessment of the impacts and vulnerabilities arising from climate change. The second is the preventative approach to drinking water source protection by working at a watershed scale to protect drinking water and supporting other lake and basin-wide initiatives.

Initiatives in this Annex are applied on basin-wide, lake-wide or watershed scales. Collaboration and cooperative implementation between federal and provincial agencies and other partners is required in order to carry out the commitments. These partners include Aboriginal communities, municipalities, conservation authorities, agriculture, industrial and other business sectors, NGOs, academic and residents. Binational agreements on transboundary issues attempt to facilitate Canadian and U.S. cooperation.

The 16 results outlined in the Annex represent a variety of initiatives that promote sustainability. Overall, the results are broad and commitments made under them are vague. Therefore it is difficult to predict the outcome of these measures or evaluate the progress that has been made. For instance, the result of sustainable use of land, water and other natural resources to provide benefits from the Great Lakes now and in the future does not target specific locations, or set benchmarks. Instead, Ontario commits to delivering education materials and applying its Provincial Policy Statement. The Annex includes other results focused on fostering increase knowledge or awareness about the Great Lakes and harms it faces. The Annex also calls for plans to be established and implemented to protect aquatic ecosystems and wildlife and to make progress on rehabilitating select native species. Again, there are no measurable targets set for the number of plans that should be prepared or what is considered to be progress in rehabilitation.

Invasive species continue to plague the Great Lakes and more have been introduced over the years due to inadequate planning, regulations, coordination between jurisdictions and funding. The Annex states that a new alien aquatic species enters the Great Lakes approximately every six to nine months. In light of the pressing nature of this issue and the slow progress in addressing it, the two governments commit to implementing the "National Action Plan to Address the Threat of Aquatic Invasive Species" in the Great

Lakes combined with increased public awareness on the subject. In order to seriously tackle this problem, the two governments will need to work quickly with their local stakeholders and U.S. counterparts to implement the plan and pass necessary legislation and policies to prevent future invasions and coordinate efforts towards eradicating invasive species residing in the Great Lakes.

The governments commit to understanding the impacts of climate change on the Great Lakes ecosystem composition, structure and function, including biodiversity, water quality and quantity, human health and safety (including access to clean drinking water), social well-being and economic prosperity. Ontario commits to work with other agencies and organizations to begin foundation work on managing the impacts of climate change. This work will likely occur in the context of Ontario's climate change strategy, which is discussed in greater detail in Part 2.1 of the Annual Report.

Lastly, the Annex states that governments commit to make "significant progress" towards drinking water source protection. This includes ensuring that the potential risks to Great Lakes Basin drinking water sources are identified and assessed, and early actions to address risks are undertaken; and developing knowledge and understanding of water quality and quantity issues of concern to the Great Lakes. Ontario has established source protection authorities and committees made up of a range of stakeholders, including First Nations. It is presumed that much of this work would arise in conjunction with the implementation of the recommendations of the Walkerton Inquiry Report. It should be noted that "significant progress" is not defined in the agreement.

Coordination of Monitoring, Research and Information Annex:
The Coordination of Monitoring, Research and Information Annex is intended to coordinate monitoring and research activities across the basin to ensure that a "comprehensive base of information is collected and captured over varying time-scales and geographic coverage to improve consistency and continuity." Binational jurisdictions, agencies, organizations and individuals are collecting data on the Great Lakes Basin ecosystem. In order to have sound decision making and accurate reporting, this information must be accessible to decision makers, managers and the public. The Annex sets out two goals which are: to undertake coordinated and efficient federal/provincial scientific monitoring and research; and to continue to improve the discovery and sharing of data, information and trends in the Great Lakes Basin ecosystem. The three results set out for the Governments of Canada and Ontario are coordinated monitoring and research programs; improved reporting on environmental conditions, changes and progress; and increased sharing of data and information among governments, organizations and basin residents. These areas have been lacking in previous agreements and there has been frequent criticism by stakeholders who are unable to access information on projects in the Great Lakes Basin and the progress being made. As a result, the lack of transparency and accountability makes the task of evaluating the success of initiatives or holding government accountable for failing to meet goals set out in COA very difficult.

Both governments have also committed to completing a review of COA by November 27, 2009. Public consultation will be part of the review, and findings and outcomes will be made public prior to COA expiring. A new COA beyond 2010 would consider the recommendations and results of the GLWQA review. Furthermore, the 2007 COA should inform the renegotiation of the GLWQA.

Public Participation & *EBR* Process

Ontario and Canada provided expanded consultation opportunities for COA. Public comments were first sought through the Environmental Registry between January 19, and February 18, 2007, in relation to PA07E001 – a proposal by MOE to work with the Government of Canada to renew COA for three years, and the possibility of amending the Annexes and developing new Annexes. Thirty-five comments were received from a diverse array of stakeholders including environmental and conservation groups, conservation authorities, municipalities, municipal, industrial and agricultural associations, citizens' groups and individuals. During this time, four information-sharing sessions were held with representatives from Aboriginal organizations, environmental organizations, municipalities and conservation authorities.

The public consultation period for the draft 2007 COA was 58 days – from March 19, to May 16, 2007. In total, MOE received 33 comments and Environment Canada received three additional comments which were also considered. The comments were made by a cross-section of stakeholders similar to those who commented on the first proposal.

Ontario pledged to continue "engaging key members of the Great Lakes Community prior to the finalization of the 2007 COA." Public consultation and meetings co-hosted by MOE and Environment Canada were held in three Ontario cities in April 2007. In addition, from November 2006 to January 2007, the ECO initiated five expert round tables and public forums with the support of Pollution Probe, MOE and MNR. The sessions were held in Kingston, Windsor, Hamilton, Thunder Bay and Toronto. The aim of these sessions was to discuss the future of the Great Lakes. A report was produced that outlined the outcome of the proceedings. Also in December 2006, MOE with the Ministry of Natural Resources and Ministry of Agriculture, Food and Rural Affairs hosted a workshop for Great Lakes municipalities that included discussions on the 2007 COA.

Overall, commenters were supportive of the draft 2007 COA and its terms, including the emphasis on sustainability and areas of special focus on climate change and drinking water source protection. However, many commenters were dissatisfied with the implementation process and governance structure of COA. Most commenters urged the governments to commit funds and resources to projects, ensure a good governance structure is in place, use sound science, improve monitoring and information sharing, and broaden public and stakeholder involvement. Commenters identified numerous environmental problems requiring immediate attention including sewage treatment plants, industrial discharges, invasive species, chemical and nutrient loading and shoreline protection. Several commenters also raised concerns related to local water matters including the lack of progress in delisting an AOC.

One submission sent on behalf of six environmental groups illustrates concerns raised by several stakeholders. It expressed disappointment and concern over COA and the governments' approach in renewing the agreement. These groups stressed the need for targets and timelines for taking action on specific obligations and how COA should address harmful pollutants and integrate source protection into the agreement. They also emphasized the need for annual determination of adequate funds towards Great Lakes initiatives. The submission identified six significant weaknesses in the draft 2007 COA as follows:

- Public engagement in the process to renew COA had been very limited during the crucial last stages of the COA discussions, and subsequently the ability to influence the outcome was minimal. It was recommended that the 2007 COA outline the process for the next COA review process.
- The governments failed to develop a new vision and program for the Great Lakes and instead made only piecemeal changes.
- The governments have not undertaken a substantive review and assessment of the current intergovernmental arrangements on Great Lakes matters and the 2007 COA does not address inadequate governance.
- The 2007 COA does not outline a comprehensive process to address current and emerging challenges to the Great Lakes in keeping with the principles of precaution and prevention.
- The absence of timelines and components for key initiatives makes it difficult to assess the effectiveness of efforts taken. Components include: resources, COA review, delisting AOCs, and the elimination of Tier 1 substances or reduction targets, Annex 3, Annex 4.
- The proposed 2007 COA lacked an express commitment to public consultation and there was no commitment to set up public advisory committees and advisory bodies for the RAPs and LaMPs.

Other environmental/conservation organizations stated that the agreement should outline the provincial and federal funding commitments, and place a greater emphasis on pollution prevention strategies. There should also be updated progress reports, greater public participation and accountability, and better invasive species prevention methods. They also stressed that better planning and building codes should be in place to ensure sustainable Great Lakes communities.

Municipalities called for cities to play a greater role in setting priorities, workplans, funding and assessing progress. The City of Toronto wanted the delisting of Toronto as an AOC to be a priority. Other issues raised by municipalities included combined sewer overflow and sewage treatment, funding initiatives to delist AOCs and establishing a multi-jurisdictional monitoring and reporting framework. They stressed that Annex goals and results should be specific, realistic and tied to funding.

Several conservation authorities stressed that they should play a greater role in the negotiation process and that conservation authorities should be considered as an implementing agency for the agreement. They emphasized that funding and workplans should use a watershed management approach. The Annexes should be better managed. Issues they highlighted included developing a septic management strategy, valuation of ecological services and prioritizing infrastructure projects for AOCs.

MOE said it took the comments under consideration. However, the ECO notes that there were no significant changes between the draft and final 2007 COA. It remains unclear how the Parties considered comments made by the stakeholders in drafting the latest agreement, and whether they resulted in any changes.

MOE stated that the Governments of Ontario and Canada are initiating a broader dialogue to develop a common direction and actions toward Great Lakes sustainability beyond 2010. This will begin with the launch of a forum in the fall of 2007. The Ontario government also committed itself to engaging the Great Lakes community, including municipalities, Aboriginal communities, NGOs and other experts in the field and interested members of the public. Ontario stated it will also continue to contribute to the review of the Canada-U.S. Great Lakes Water Quality Agreement.

SEV

MOE's Statement of Environmental Values highlights environmental protection, the ecosystem approach and resource conservation as the three guiding principles it will use when making decisions that affect the environment.

In its SEV briefing note, the ministry affirmed that these principles are reflected in COA. MOE states that the agreement sets out to protect the Great Lakes environment by reducing the amount of pollution entering the basin, restoring and protecting AOCs, and contributing to the implementation of commitments under other environmental agreements. It also states that COA signatories (including MNR and OMAFRA) are guided by the ecosystem approach by recognizing the interdependence of the environment and humans and their reliance on the Great Lakes system. In addition, COA aims to conserve resources by improving water quality and drinking water, conserving biodiversity and responding to the threats of invasive species and climate change.

ECO Comment

The ECO commends the parties of COA for signing the 2007 agreement and reaffirming their commitment to rehabilitate and protect the Great Lakes community. However, the ECO remains concerned with the slow rate of progress, limited funding, limited community engagement and lack of transparency and accountability on the progress in meeting goals and distribution of funds. In addition, the ECO notes that the 2007 COA does not adequately emphasize the importance of water conservation as a measure to protect the Great Lakes.

The ECO has commented on preceding agreements in past reports. In the 1999-2000 Annual Report, the ECO found that most of the targets set out under that 1994 COA were not met. In the 2002-2003 Annual Report, the ECO found that the 2002 COA agreement lacked an ongoing commitment to funding and staffing, transparency or independent review of implementation, and a strategy to address non-native species. The 2005-2006 Annual Report found that the parties to the 2002 COA did not meet their commitments and expressed concern over public involvement and lack of transparency attached to the spending of funding. Although the 2007 COA looks promising, many of the same concerns raised in the past may still exist.

For the most part, the ECO commends the governments' public consultation process and in particular, for posting both the intention to negotiate a new agreement, as well as the draft 2007 COA on the *EBR* Registry and for allowing an extended comment period. This helped ensure that the public and stakeholders were given ample notice to provide comments at either stage.

However, the ECO also has concerns regarding the extent of public involvement in the negotiation process and the implementation of activities outlined in the agreement. Environmental groups had called upon the two governments to go beyond consultations before the 2007 COA was signed and to meaningfully engage the Great Lakes community about how the Governments of Canada and Ontario should fulfil its goals at the local level. Since the 2007 COA prioritizes AOCs for delisting and places a greater emphasis on sustainable Great Lakes communities in Annex 3, it is even more vital for the two governments to engage and mobilize local stakeholders and municipalities and other ministries. The ECO notes that for the agreement to be successfully implemented, it requires the involvement of the various Great Lakes stakeholders. The ECO urges MOE to initiate a broader dialogue with stakeholders to achieve Great Lakes sustainability beyond 2010, and to set up the forum planned for fall 2007 aimed at engaging Great Lakes stakeholders. These meetings need to take place in a timely manner in light of the short time frame for the agreement and the ambitious goals it has set out for itself.

It has been approximately 37 years since the first COA agreement was signed. However, since then there has been limited progress on Great Lakes clean-up. Since the inception of COA, only two AOCs have been removed from the list of AOCs, and some stakeholders have requested that additional sites be added as an AOC (for example, Simcoe county). There is limited easily accessible information on the status of the AOCs and their recovery progress, nor is it clear that delisted AOCs are being monitored to ensure that they do not return to a degraded state again. With the numerous environmental stressors facing the Great Lakes the question remains as to whether the slow pace of implementing COA will be able to keep up with emerging environmental problems and protect the Great Lakes Basin.

Furthermore, invasive species are still a serious threat to the Great Lakes because aggressive coordinated control measures are not in place. Toxic pollutants are still present in the Great Lakes waters at unacceptable levels, and new concerns, such as pharmaceutical residues, need attention. Combined sewage outflows still contaminate beaches.

The ECO has noted the lack of transparency in funding commitments under previous COAs. Under the 2002 COA, MOE pledged over $50 million to be spent over the five years. However, it is unclear how this money was spent and what progress was made in meeting goals. The Ontario government has currently pledged $32.4 million towards Great Lake restoration, and again it is not clear how the money will be allocated and whether the progress achieved through funding will be publicly reported. In any case, the funding that has been committed thus far is nowhere near Environment Canada's multi-billion dollar estimate of what it will cost to delist the remaining Canadian AOCs.

Considering the geographic size of the Great Lakes and the complexity of the problems facing the region, it is doubtful that $32.4 million will be enough to address all the priorities highlighted in the 2007 COA. In comparison, $30 million was pledged by Ontario to clean up Hamilton Harbour. The ECO commends Ontario for the additional funding it has contributed for Randle Reef, the St. Lawrence River and Lake Simcoe and strongly urges Ontario to undertake additional funding commitments towards cleaning up provincial AOCs. The amount of funding under the 2007 COA does not reflect the magnitude of the task at hand. The province should not be restrained by the limited contributions made by the federal government, and should ensure the province realizes the goals set out in the 2007 COA. As outlined in the ECO's Special Report entitled "Doing Less with Less", the Ontario government has been forced to limit their activities as a result of limited funds and resources. Protecting the Great Lakes should not succumb to these limitations and Ontario should ensure adequate funding is available to achieve the desired goals.

The ECO remains concerned that many targets are not clearly defined and there are no deadlines set out to achieve the results in the Annexes. It is difficult to objectively ascertain whether the signatories are meeting their commitments under the agreement during the course of the three years. Many of the problems identified in the first COA remain and are now compounded by other environmental pressures such as climate change and invasive species.

The ECO also notes that the previous COA had expired for five months prior to the release of 2007 COA. This suggests difficulties remain with the review process and the setting of timelines and priorities. The ECO echoes the calls made by commenters that governments need to set out detailed workplans with clear targets and timelines and sources of funding, and the responsibilities of different levels of government and stakeholders. There should also be a comprehensive results monitoring program and the information collected should be publicly available.

In light of the lack of progress being made in tackling environmental problems in the Great Lakes Basin, programs lacking necessary funding, objective targets and realistic timelines, as well as minimal accountabilities for Parties, the ECO suggests that the COA progress reports should be subject to independent review. An independent review of COA could assess its effectiveness in meeting goals to restore and protect the Great Lakes ecosystem.

Although the ECO has concerns regarding how the 2007 COA will be implemented, the consultation process raised many important recommendations that the federal and provincial government should consider as they work towards implementing the agreement. The ECO believes that greater stakeholder engagement and secure funding will help ensure that progress is realized on many of the critical environmental targets set in the 2007 COA. The ECO will continue following developments relating to the Great Lakes including the proposed *Lake Simcoe Protection Act*, and the clean-up at AOCs.

Review of Posted Decision:

4.17 Municipal Hazardous or Special Waste (MHSW) Program Plan

Decision Information:

Registry Number: 010-0558	Comment Period: 30 days
Proposal Posted: June 11, 2007	Number of Comments: 28
Decision Posted: February 22, 2008	Decision Implemented: Phase 1 - July 1, 2008

Description

On February 19, 2008 the Minister of the Environment approved the Municipal Hazardous or Special Waste (MHSW) Program Plan (the "Plan") which was developed to improve diversion – reduction, reuse and recycling – of hazardous and special waste materials. Consumers as well as some industrial, commercial and institutional (IC&I) facilities will be encouraged to take waste materials, such as paints, solvents, pesticides and batteries, to collection points for reuse or recycling. In the absence of convenient diversion services, these materials have often been landfilled, incinerated or dumped onto the ground or into sewer systems, wasting valuable natural resources and contaminating our air, soil and water. The five-year Plan outlines opportunities to improve access to MHSW collection services across the province, reduce the introduction of products that contain hazardous or special wastes into the Ontario marketplace, and increase diversion of MHSW through reuse and recycling. The Plan includes target collection and diversion rates. It also requires brand owners and first importers of products containing hazardous or special materials to provide long-term funding for the program. At the request of the Minister, the Plan is being developed under the *Waste Diversion Act* (*WDA*) and implemented in phases with specific types of MHSW being targeted in each phase.

In general, municipal (often called household) hazardous waste includes acids such as drain cleaners and rust removers, antifreeze, bases such as adhesives and ammonia, batteries, flammables such as paint thinners and stains, gas cylinders, motor oil, oxidizers such as bleach, paint, pesticides and pharmaceuticals including hypodermic needles. Even in very small quantities, these wastes are toxic, corrosive, flammable and/or explosive and require special handling to ensure the safety of the workers and the public and the health of the environment. Improper disposal of MHSW can: harm human health, causing headaches, rashes, asthma attacks and poisonings; harm wildlife and ecosystems; disrupt septic and sewage treatment systems; contaminate ground and surface water including drinking water; and contaminate soils and accumulate in crops. As a result, they are not generally collected as part of a municipality's curb-side waste collection program. In fact, municipal landfill sites were not designed to safely contain these wastes. Although MHSW comprises a small percentage of Ontario's municipal waste stream, it has a much greater potential to cause harm than other municipal waste materials such as Blue Box materials and organics.

The designating regulation, O. Reg. 542/06 under the *WDA*, lists the types of municipal hazardous waste and specifically identifies the special wastes that the Minister of the Environment may ask to be included in the Plan. For example, under O. Reg. 542/06, municipal hazardous waste materials include any household wastes that have corrosive, flammable, toxic, ignitable and/or chemically reactive properties, whereas, the list of special wastes includes batteries, portable fire extinguishers, fluorescent light bulbs and thermostats. The materials listed in Table 1 under Phase 1 have been included in the current Plan. The Minister has advised that the materials listed for Phase 2 are the next priority.

Table 1: Phase 1 and Phase 2 MHSW Materials

Phase 1 – Implemented July 1, 2008	Phase 2 – Implementation Date to be Determined
Paints and coatings, and containers in which they are contained	Batteries other than single use dry cell batteries
Solvents, and containers in which they are contained	Aerosol containers
Oil filters after they have been used for their intended purpose	Portable fire extinguishers
Containers that have a capacity of 30 litres or less and that were manufactured and used for the purpose of containing lubricating oil	Fluorescent light bulbs and tubes
Single use dry cell batteries	Pharmaceuticals
Antifreeze, and containers in which they are contained	Sharps, including syringes
Pressurized containers such as propane tanks and cylinders	Switches that contain mercury
Fertilizers, fungicides, herbicides, insecticides or pesticides and containers in which they are contained	Thermostats, thermometers, barometers or other measuring devices containing mercury

The Plan assumes that MHSW such as paint will be collected in its original container, which is consistent with existing practice. However, since some containers, including empty paint cans and oil containers are already diverted under the Blue Box Program Plan, the MHSW Program Plan notes that the two Plans will need to be reconciled to avoid double-counting of these wastes and double-charging stewards.

Although the approved Plan includes measures to collect and divert used oil filters, it does not include any such measures for used oil, which was specifically exempted by O. Reg. 542/06. The used oil waste diversion plan that was drafted under the *WDA* in 2004 was never approved and was eventually put on hold by the Ministry of the Environment (MOE) in 2006. In a separate decision in 2007, the government banned the burning of used oil in space heaters in southern Ontario as a means of managing this waste. For the ECO's review of this decision, see section 4.7 of this Supplement.

R.R.O. 1990, Regulation 347 – General – Waste Management:
In Ontario, waste is generally categorized as either non-hazardous, or hazardous and liquid industrial waste. Regulation 347 ("Reg. 347") made under the *Environmental Protection Act* (*EPA*) defines hazardous waste as any one of 11 types of waste including corrosive, ignitable, leachate toxic or pathological. Since 1985 generators of hazardous and liquid industrial wastes that exceed the small quantity exemptions have been required to register with MOE. Generators must use haulers that are

approved to ship their wastes to disposal facilities that are approved to receive the wastes. Haulers and disposal facilities must have certificates of approval (Cs of A) from MOE. Reg. 347 also sets out requirements for tracking these wastes from the generator to final disposal. MOE's Hazardous Waste Information Network (HWIN) is an electronic data management system that allows hazardous waste generators, haulers and receivers to register their activities and to create and process manifests that track online the types and quantities of wastes from generation to disposal.

The small quantity exemptions allow the public and some small businesses to generate and haul their hazardous waste to waste facilities such as municipal transfer stations without the administrative burdens placed on large volume generators. For example, an IC&I facility that produces less than five kilograms of corrosive waste per month would be exempted, whereas, generators of larger amounts of corrosive waste are subject to registration, approval and manifest requirements and are not allowed to transport their wastes to municipal waste facilities.

In its 2007 Annual Report, released before the MHSW Program Plan was approved, the Auditor General of Ontario (AGO) reported that MOE did not know the total amount of hazardous waste that is generated by Ontario households. The AGO was also concerned that the public may not be aware of or have easy access to collection services. In its response, MOE advised the AGO that the Plan would address these issues. The AGO also noted that MOE did not have adequate monitoring and inspection procedures in place to ensure that hazardous waste depots, haulers and receivers were approved and operating appropriately; nor did it have any performance measures for hazardous waste management. MOE advised that it would also address these concerns.

Waste Diversion Act (*WDA*):
In June 2002, the Ontario government enacted the *WDA* to "promote the reduction, reuse and recycling of waste and to provide for the development, implementation and operation of waste diversion programs." Under the *WDA*, a regulation is first made designating a waste, and then a waste diversion program is developed that sets diversion targets and provides sustainable funding for the program. MOE quickly designated Blue Box waste as the first material for which a waste diversion program was to be developed and indicated its intention to designate another eight materials – used oil, used tires, organics, electrical components, batteries, fluorescent lighting tubes, pharmaceuticals, and household hazardous waste – within the next couple of years. The Blue Box Program Plan was implemented in 2004. Plans were drafted for used oil and used tires but were put on hold. In spring 2008, the Minister of the Environment advised that a used tire recycling program will be introduced in 2008, and that a waste diversion plan for Waste Electrical and Electronic Equipment (WEEE) had been posted on the Registry (number 010-3125) for comment.

The *WDA* established Waste Diversion Ontario (WDO) as a permanent non-government corporation comprised of representatives from industry, municipal and commercial sectors, and the environmental community. Under the *WDA*, brand owners and first importers of products that become a designated waste are called "stewards" and can join together to establish an industry funding organization (IFO) for that waste. IFOs are responsible for developing and operating waste diversion programs and for funding them with fees charged to the stewards. The WDO incorporated the IFO, reviews the proposed Plans and forwards them to MOE for approval. Stewardship Ontario (SO) is the IFO for MHSW and developed the Plan that is the subject of this review.

Under the *WDA*, waste diversion plans must include diversion targets; measures to reduce, reuse and recycle designated wastes; research and development related to the management of the designated waste; and educational and public awareness activities. In addition, designated wastes must not be burned, landfilled or applied to land.

In 2007, MOE began a review of the *WDA*, which is required every five years, and will be publishing a report on its review.

Municipal Hazardous Waste Collection:
Unlike Blue Box materials, municipalities are not required legally to collect MHSW and are not required to do so under this Plan. However, some municipalities introduced household hazardous waste programs about 20 years ago, sometimes in response to requirements in their Cs of A that prohibited municipalities from depositing these materials in their landfill sites. MOE often provided financial support for these programs. Since then, many municipalities have opened permanent depots where residents can drop off MHSW and hosted one-day collection events. In 2005, 89 municipalities collected MHSW at 98 depots and held 169 collection events across Ontario. Since convenient access to collection services is critical to the success of any waste diversion program, Product Care Association, a not-for-profit industry association that manages several product stewardship programs for MHSW across Canada, contracted the Association of Municipal Recycling Coordinators (AMRC) to survey all MHSW programs in Ontario. The AMRC found that the level of service in Ontario varied widely. While all residents in south central Ontario had access to collection services, many residents in eastern and northern Ontario did not.

- The Regions of Peel, Halton, Durham and York operated year-round depots that were open to the public six days a week, and also hosted annual single-day events.
- The United Counties of Stormont, Dundas and Glengarry (SDG), and the County of Lanark operated seasonal depots and SDG hosted annual single-day events. Residents of these areas had access to collection services for less than 30 days annually.
- Some counties such as Haliburton, Dufferin, Bruce, Brant, Huron, Oxford, Norfolk and Haldimand hosted annual single-day events. Residents of these areas had access to collection services for less than seven days annually.
- The District Municipalities of Cochrane and Timiskaming, and many towns/townships in the District Municipalities of Thunder Bay and Kenora offered no collection services.

Municipalities without a MHSW program cited cost as the primary reason. Municipalities with a MHSW program noted several challenges to offering better collection services, such as the cost of holding even a single-day event (estimated to be in excess of $10,000), lack of support at the upper tiers of municipal governments, wide fluctuations in the volumes of waste generated (by small local populations versus large summer populations), lack of contractors to provide required services, and difficulties encouraging residents to participate due to inclement weather or long travel distances.

A few non-municipal collection services are available in Ontario such as the service offered to farmers by CropLife Canada that takes back empty pesticide containers and obsolete pesticides, and retailers that take back empty propane tanks.

According to data provided to the WDO by municipalities, almost 16,000 tonnes of MHSW materials were collected in 2006, which translates into approximately 1.34 kilograms per capita in 2006. Sixty-six per cent of the collected waste was recycled or reused. Paint, oil and oil filters, and flammables represented 78 per cent of the total tonnage collected. A number of municipalities offered re-use and "use it up" programs for MHSW, most commonly for paint received from residents.

MHSW Program Plan – Common Elements:
The new Plan includes elements that are common to all types of MHSW, such as SO and WDO administration costs, promotion and education, research and development, market development and performance benchmarks. The Plan also includes funding for MOE to enforce the Plan. During Year 1, commencing July 1, 2008, a Promotion and Education (P&E) Strategic Plan will be developed by SO and launched with the assistance of the municipal and industry advisory committees. The objectives of the P&E Strategic Plan will be to increase public awareness, reduce generation of MHSW and encourage diversion of these materials through changes in behaviour. The primary message to consumers will be "buy only what is needed, use it up, dispose of residue and container responsibly." At the request of the Minister, the Plan includes annual accessibility targets to ensure that collection and diversion services are available to all Ontarians and funding for capital costs to meet accessibility targets. In Year 1, the Plan proposes that accessibility will more than double. The Plan envisions that the number of one-day collection events will increase and that new municipal depots will be established. In subsequent years, new accessibility targets will be set based on the results from Year 1.

The Plan notes that recycling services are limited or non-existent for many MHSW materials. Only one paint recycler, one single use dry cell battery recycler and one oil container recycler (another is in the process of getting permits) currently operate in Ontario.

The Plan also includes requirements for stewards to determine the quantities of MHSW materials sold in Ontario each year, and for the flow of MHSW materials from collection to final destination (including materials provided for reuse) to be tracked. The data will be used to determine whether reduction efforts (buy only what is needed) are effective, calculate annual stewardship fees and measure performance of the program.

Program Costs:
The costs in Year 1 of the Plan, which began on July 1, 2008, were calculated by SO. The multi-step calculation included: determining the operating costs to manage each type of MHSW material after it was collected through municipal and non-municipal channels (such as retail take-back programs); estimating capital and service agreement costs to improve access to diversion services; and estimating research and development, SO and WDO administration, and promotion and education costs. Under this Plan, stewards will also be paying for MOE enforcement costs. Per unit material-specific levies (fees) were then calculated by dividing the total cost of managing each type of material by the estimated total number of units introduced into the Ontario market. Stewards will be required to pay the material-specific levies based on the number of units of the subject material that they market and distribute in the province. For example, the material-specific levy for 3.78 litres of paint is $0.358 and for a small oil filter, $0.499. The Plan does not specify whether levies should be included within the retail price or made visible as a separate charge to the customer.

In 2007, it cost municipalities approximately $9.3 million to manage Phase 1 MHSW materials. Collection activities, including staffing of depots and events accounted for 20-25 per cent of the total cost, and post-collection activities including transportation from the collection facility, processing, recycling and disposal of the waste, 75-80 per cent. Under this Plan, municipalities will continue to be responsible for the full cost of collection activities for all MHSW materials that they manage. However, municipalities will be compensated for their post-collection costs for managing Phase 1 materials. Since municipalities are not required by regulation to manage MHSW materials, any expansion of existing services or introduction of new services to meet accessibility targets, including some new collection services, must first be approved by SO as these costs will be paid by the stewards. In Year 1, the total program cost for Phase 1 materials has been budgeted to be $28.4 million or $1.23 per kilogram diverted, and in Year 5, $38.8 million or $1.16 per kilogram diverted.

Target Annual Collection and Diversion Rates:
The Plan includes target annual collection and diversion rates for most Phase 1 materials based on estimates of the tonnage of the specific material that was sold in Ontario, collected and diverted in 2007. However, SO was unable to obtain verifiable 2007 diversion rates for three materials – solvents, fertilizers and pesticides. As a result, target annual diversion rates for solvents and fertilizers were established for only Years 3, 4 and 5 on the expectation that diversion programs will be in place by then. Target annual diversion rates for pesticides were not established since no diversion options were identified nor anticipated within the five years of the current Plan. In addition, data for some Phase 1 materials did not include the containers.

The target annual collection and diversion rates are based on a number of assumptions:

- An annual growth rate of two per cent in hazardous or special materials sold in the marketplace due to population growth, unless industry experts indicated that a lower rate was appropriate.
- Reductions in the amount of waste generated from consumable materials such as paint as a result of promotion and education activities sponsored by the Plan.
- Increased access to collection services including new industry take-back programs.
- Improved reuse and recycling services.
- Development of new reuse and/or recycling services.

Although Table 2 only lists selected material-specific estimates for 2007 and Year 5, the Plan actually includes estimates for each of the five years of the Plan. Progress towards meeting the targets will be reviewed annually by SO.

Table 2: Estimated Per cent Collected and Diverted in 2007 for selected MHSW Materials and Proposed Targets for Year 5 of the Program ending June 30, 2013

	2007 Baseline Estimates			Year 5 Targets	
Phase 1 Selected Material	**Available for Collection (Tonnes)**	**Currently Collected (Per cent of available)**	**Currently Diverted (Per cent of available)**	**Collected (Per cent of available)**	**Diverted (Per cent of available)**
Paints and coatings not including containers	12,495	51	44	61	53
Solvents not including containers	1,504	35	-	45	10
Oil filters	18,480	38	35	84	78
Oil containers	4,370	6	3	50	50
Single use dry cell batteries	5,039	5	0.5	25	13
Antifreeze including containers	14,400	16	15	50	47
Refillable pressurized cylinders	2,040	91	91	98	98
Non-refillable pressurized cylinders	672	12	12	46	46
Fertilizers not including containers	146	30	-	45	30
Pesticides (including fungicides, herbicides, insecticides) not including containers	135	50	-	55	-
Total	**59,281**	**32**	**28**	**62**	**56**

Note: According to the Plan, the sales volumes (in tonnes) are expected to increase annually; whereas, the tonnage available for collection is not expected to change over the five years of the Plan. The Plan assumes that public education will result in the public doing a better job determining how much product they should purchase, meaning that there will be less left-over material for collection.

MHSW Program Plan – Phase 1 Material-specific Plans:

The Plan includes "material-specific plans" which are diversion plans that are specific to each type of MHSW. Each material-specific plan includes: a definition of the waste and descriptions of the current collection, diversion and disposal services; potential reduction, reuse, recycling and disposal options; barriers and opportunities to increase diversion; target annual diversion rates; and stewardship fees to be charged in Year 1 of the Plan.

Implications of the Decision

According to the Recycling Council of Ontario, households were the largest single source of hazardous waste generation in Canada in the mid-1990s. However, the Ontario government has been reluctant to develop any comprehensive programs to collect and divert this waste until now. With this Plan, only the second waste diversion plan approved under the *WDA*, new awareness campaigns targeting the public with messages about reducing consumption of household hazardous materials and proper handling techniques, as well as instructions for disposal, are expected by Year 2 of the program. Municipalities that want to improve access to collection services, particularly in areas where accessibility is poor, may be able to obtain funding support from the SO to offset some of their post-collection costs. However, for the most part, municipalities will remain fully responsible for the costs of whatever collections services that they offer. Retailers that offer collection services may be eligible for funding and will be encouraged to expand their programs to more outlets.

The Plan does provide for better tracking of the flow of household hazardous material from the point of collection through to final destination, including reuse which is typically not reported. The data will be used to assess performance against the target collection and diversion rates. The collection and diversion targets appear to be conservative in part due to incomplete baseline data and a number of challenges that the program faces.

Recycling services for most household hazardous waste are limited in Ontario and anticipated increases in volumes are unlikely to justify significant expansion of these services. As a result, some MHSWs will likely be shipped to out-of-province facilities, particularly if they are closer than in-province facilities. Concerns about safety and liability may also deter some municipalities and retailers from providing some collection and/or diversion services.

The MHSW Program will double the amount of MHSW diverted from landfill over the next five years, and budgets $210,000 over the first five years for enforcement purposes should enforcement be required during that period of time.

Public Participation & *EBR* Process

The proposal was posted on the Registry for a 30-day comment period. MOE received 20 written comments and eight online comments. In its decision notice, MOE advised that the commencement date for the Plan had changed from January 1, 2008 to July 1, 2008. No other substantive changes were made to the Plan.

Harmonization with Other Provincial Waste Diversion Plans:
The Association of International Automobile Manufacturers of Canada (AIAMC) expressed concern that the version of the plan posted on the Registry no longer exempted "first install of OE [original equipment] oil filters." As a result, the AIAMC believes that the promise that Ontario's used oil filter program would be harmonized with those in other provinces, which exempt OE oil filters, has been broken. The AIAMC noted that it is very complicated to track the components of a new vehicle as components move back and forth across national borders during assembly and manufacture. Furthermore, 90 per cent of vehicles manufactured in Ontario are exported and are exempt from the MHSW program. In fact, AIAMC advised that, of the total number of oil filters captured under the Plan, OE oil filters account for only three per cent and are already being managed by automotive dealers. Honeywell, AIAMC and others recommended that governments across Canada and North America harmonize their product stewardship programs to "encourage compliance and administrative efficiency."

AIAMC also noted that the MHSW program has not been harmonized with the Blue Box program since stewardship fees for used oil containers are already being charged under the Blue Box Program. Honeywell urged MOE to have one program that manages the entire used oil waste stream as is done in several other provinces instead of having separate programs for used oil, filters and containers. However, Safety-Kleen disagreed, noting that the decision to not include used oil in the MHSW program was prudent since municipalities collect less than two per cent of the used oil generated in Ontario and since used oil collectors usually pay generators for their used oil. Householders, however, are not paid to return their used oil to municipalities for disposal.

Recommendations Regarding Phase 2:
Several commenters, including the Association of Municipal Recycling Coordinators (AMRC), the Association of Municipalities of Ontario (AMO) and the Bluewater Recycling Association (BRA) urged MOE to designate all of the remaining MHSW materials in Phase 2, noting that the cost of managing MHSWs under different systems is an "unnecessary operational and administrative burden." Some

commenters, including the Canadian Paint & Coatings Association, advised that the definition of "solvent" should be broadened to include all flammable liquids consistent with the Canadian Standards Association definition in Z752-03. This change would clarify what is meant by solvent, include solvents currently exempt from the Plan, and reduce the proposed levy for solvents.

AMRC, AMO and Quinte Waste Solutions believe that the MHSW program should accept all fertilizers and pesticides, not just those specified in the Plan.

Several commenters, including the Canadian Institute for Environmental Law and Policy (CIELAP), Canadian Paint & Coatings Association and Pollution Probe, urged MOE to proceed quickly to Phase 2, citing various reasons including:

- a disposal program for compact fluorescent bulbs is "urgently needed" given the ban on the sale of incandescent light bulbs effective 2012; and
- incineration of mercury-containing waste accounts for about 200 kilograms of annual mercury emissions in Ontario.

Lack of Incentives for Take-back Initiatives:
According to AMRC and AMO, the requirement to exclude collection costs from the calculation of levies effectively eliminates any incentive for industry or retailers to develop or expand take-back programs. Pollution Probe noted that improving the public's ability to return MHSW through return-to-retail and industry take-back programs will be critical to the program's success. AMRC, AMO and Quinte Waste Solutions urged MOE to consider including collection costs, noting that the proposed Waste Electrical and Electronics Equipment Program Plan does allow collection costs to be included in the calculation of stewardship fees.

Accessibility and Diversion Targets:
AMRC and AMO urged MOE to clarify that stewards are responsible for ensuring access to the MHSW program in areas not serviced by municipalities, and that accessibility targets are based on factual information and supported by the public. Furthermore, they advised that municipalities will not be willing to amend their Cs of A (Waste) to improve accessibility if MOE uses it as an opportunity to amend unrelated aspects of the Cs of A (Waste). CIELAP noted that program accessibility would improve if retailers provided take-back services.

Several commenters advised that collection and diversion targets should be reviewed annually. One commenter recommended that funding be provided to improve collection of MHSW from multi-residential dwellings, for example, by providing a used battery drop box.

Safety-Kleen, the largest collector and re-refiner of used oil in Ontario, advised that at least 64 per cent and possibly as much as 74 per cent of used oil filters are collected annually, far more than SO's estimate of 38 per cent in 2007. Accordingly, the proposed recovery targets for used oil filters (84 per cent in Year 5) and containers in the Plan are low.

The Canadian Consumer Specialty Products Association (CCSPA) noted that diversion of some MHSWs, particularly pest control products, "may not be legally, technically, nor financially feasible" and that the only safe method of managing these residuals may be to dispose of them in a landfill or by incineration. The CCSPA also requested that the effectiveness of the program be measured, not just in terms of tonnage diverted relative to tonnage generated, but also relative to tonnage available for diversion since it will vary with the economy and consumer purchasing habits.

CIELAP urged the government to develop a "comprehensive waste management policy" to "ensure maximum diversion of waste in Ontario."

Automotive Waste Diversion Programs are Already in Place:
The Canadian Vehicle Manufacturers' Association (CVMA) advised that it had significant concerns with the MHSW program noting that it already had "well-managed source separation programs at both

manufacturing facilities and dealerships" that include anti-freeze and oil filters. The stewardship fees are "essentially an additional tax on new vehicles sold in Ontario to fund programs to divert materials that are already well-managed within the automotive sector." The CVMA noted that the MHSW program was intended to capture wastes generated by the do-it-yourself (DIY) sector, not the do-it-for-me (DIFM) sector that automotive facilities service. The CVMA notes that most oil filters and antifreeze are collected and managed by the IC&I sector, not by municipalities.

Recycling of Batteries:
Proctor & Gamble Inc. (P&G) was concerned that alkaline and carbon zinc batteries, which comprise less than 0.1 per cent of waste, were included in Phase 1 since they do not contain any toxic materials and do not pose any adverse human health and environmental effects. P&G noted that diverting them will yield "marginal" improvement to overall diversion rates and will be exceptionally costly. To reduce costs, P&G recommended that MOE move rechargeable batteries from Phase 2 to Phase 1 so that both types of batteries could be managed under the existing rechargeable battery collection and processing program run by the Rechargeable Battery Recycling Council. P&G also suggested that the levy should be higher for batteries containing mercury which have more adverse effects on the environment than for non-mercury containing batteries. Pollution Probe also suggested that stewardship fees should be based on the toxicity of MHSWs to encourage measures that result in reduction and/or reformulation of products.

The AIAMC and CVMA requested that first installation of single use dry cell batteries used in keyless entry remote controls and garage door openers be exempted due to the complexity of tracking them, the same reason that they requested MHSW generated by the sale of new vehicles be exempted.

Promotion and Education Advisory Committees:
Pollution Probe and CIELAP recommended that non-government organizations and/or health representatives be invited to participate in one of the proposed promotion and education advisory committees.

IC&I Wastes:
PPG Architectural Coatings recommended against including any waste from the IC&I sector on the grounds that it would put the public and others at risk and could contaminate the residential waste streams rendering them unsuitable for reuse. CCSPA advised that waste solvents generated by the IC&I sector may be flammable, corrosive or reactive at levels prohibited in consumer products. Quinte Waste Solutions and Niagara Region also had concerns with including IC&I wastes in the MHSW program.

To provide a simple, free and auditable collection service for IC&I wastes captured under this program, Safety-Kleen recommended that MOE: create a "small quantity waste generator" category in the existing Hazardous Waste Information Network (HWIN) system; require small quantity generators to register under HWIN; allow them to haul their wastes to a municipal MHSW depot without a manifest; require small quantity generators and the MHSW depot to have a written agreement for the hauled materials; and require them to provide SO with a copy of the agreement. The hauler would be required to report the quantities of MHSWs that were hauled to SO in order to collect transport fees under the Plan. Safety-Kleen noted that such a written agreement would address the loophole in Reg. 347 that allows retail service stations to transport wastes from servicing motor vehicles without manifests.

Other Comments:
The Retail Council of Canada (RCC) advised that its members do not support internalization of stewardship levies (i.e., including the stewardship levy within the sale price.) The RCC advised also that the *WDA* must remain silent on how and where stewardship fees are reflected. Several commenters recommended that stewards be given at least six months to implement the necessary systems and procedures.

Safety-Kleen urged MOE to preclude SO from taking on the role of contracting for waste collection services, e.g., for the collection of used oil filters and containers, from the non-municipal waste generation sector, since it would distort the existing relationship between generators and hazardous waste service providers.

Pollution Probe suggested that, if MOE phased-out mercury-containing products entirely as have many other jurisdictions, there would be no need for a waste diversion plan for these wastes.

SEV

In a brief statement, MOE explained that the MHSW Program Plan promotes resource conservation because it encourages industry to reduce the waste generated by their products and increase diversion rates and collection and recycling capacity. The Plan also encourages industry to "educate and inform" consumers about how to properly manage and dispose of hazardous and special wastes. MOE explained that the Plan protects the environment since hazardous materials will be diverted away from landfill sites. In addition, research and development initiatives in the Plan should increase diversion and ensure that the province has the capacity to manage, reuse and recycle MHSW in an environmentally responsible manner. The Plan encourages manufacturers and retailers to take responsibility for the final disposal of their products and become aware of the environmental impact of their products. Industry and consumers gain a better understanding of the "interdependence between the environment, economy and society." The Plan embraces the ecosystem approach by promoting the principle of Extended Producer Responsibility.

Other Information

In 2004, Product Care contracted the AMRC to carry out a study of MHSW as part of the groundwork for designating MHSW under the *WDA*. AMRC reviewed nine Ontario municipal programs. The final report, "Household Hazardous Waste Baseline Composition Study, 2004," described the MHSW services provided by each program including the number and operating hours of collection depots, number of single event collection days, types and tonnage of waste collected, number of residents served by the program and daily collection limits. The final report also included information on reuse/use-it-up services including types and tonnage of collected materials such as paints, stains and lubricants that were offered to the public for reuse/use-it-up. The report is available on Product Care's website: http://www.productcare.org.

In September 2007, the Canadian Institute for Environmental Law and Policy (CIELAP) published "Hazardous Waste in Ontario: Progress and Challenges: 2007 Status Report." This is the third report since 2000 in which CIELAP has analyzed hazardous waste management. CIELAP recommended that the Ontario government ensure that the MHSW Program Plan, which was available in draft form when CIELAP released its report, is "effectively implemented and promoted to the public" and that it promotes extended producer responsibility. CIELAP made numerous other recommendations with the objectives of strengthening the tracking and treatment of hazardous waste, and addressing current policy, regulatory and compliance gaps. The report is available on CIELAP's website: www.cielap.org.

According to Pollution Probe, the 2006 target recovery rate for mercury-containing lighting products in the European Union was 80 per cent; whereas, in Canada the recovery rate is only seven per cent. The United States has set a target recycling rate of 80 per cent by 2009. Both jurisdictions have used legislation and directives to increase their recycling rates.

In 2004, MOE set a provincial goal of diverting 60 per cent of its waste from disposal by the end of 2008 and discussed how the goal could be achieved in "Ontario's 60% Waste Diversion Goal – A Discussion Paper." A year later, the Environmental Assessment Advisory Panel (EA Advisory Panel,) a panel established by MOE of expert EA practitioners, recommended that MOE develop a policy for the waste sector that included "quantified assessments of the 'need' for specified facilities or projects," including waste diversion projects. MOE agreed and has committed to outlining the province's waste priorities in a "statement of provincial priority." In addition, in June 2007, MOE posted a proposal on the Registry (number 010-0420), requesting comment on a draft "Policy Statement on Waste Management Planning." The draft policy proposed a waste value chain, which established waste reduction as the first priority, followed by waste reuse and recycling, thermal treatment with energy recovery and, lastly, thermal treatment or landfill without energy recovery. If the draft policy is approved, municipalities will be required to prepare 20 to 25 year waste management plans describing how they will reach the provincial goal of 60 per cent diversion from disposal.

ECO Comment

The ECO is pleased that this program plan has been approved, although many of the details still need to be addressed. The Plan should increase diversion of MHSW and the public's awareness of the importance of reducing household hazardous waste. The priority placed on improving consumer access to MHSW diversion services, which was one of the concerns the AGO expressed in its 2007 report, should relieve some consumer frustration at having to store MHSW, sometimes for months, and reduce the likelihood that MHSW will be unsafely disposed. The Plan will shift the post-collection costs of managing these materials from municipalities to industry. MOE's approval of this Plan signals its continued support of producer responsibility and the *WDA*.

One of the strengths of programs developed under the *WDA* is the requirement to track performance and audit results. For the first time, Ontario will have reliable province-wide data on the types and amounts of MHSW materials sold, collected and diverted, and will know how the wastes are finally disposed. This data will help identify opportunities for improvement. A second strength is the requirement for stewards to fund MOE enforcement and inspection activities to ensure compliance with the Plan. Both of these "strengths" address concerns that the AGO raised in its 2007 report.

In our 2005-2006 Annual Report, the ECO advised that progress on initiatives needed to achieve the provincial goal of diverting 60 per cent of Ontario's waste from disposal by 2008 was slow. Although this program will not make a significant contribution to the province's overall waste diversion goal, MHSW does have a disproportionately larger impact on human and environmental health than many other wastes and for that reason it is a very important component of waste management. The ECO suggests that MOE consider bans on certain types of hazardous and special materials to eliminate both their environmental risks and the need for costly waste management programs.

In our review of the Blue Box Program Plan in 2003-2004, the ECO urged MOE to develop an overall waste management strategy that addressed the full range of waste management approaches, including landfilling, incineration, land application and diversion. MOE has never committed to developing a strategy but it has committed to developing a "statement of provincial priorities" and has released the draft "Policy Statement on Waste Management Planning." The ECO will continue to monitor MOE's progress on waste management.

Review of Posted Decision:

4.18 *Regulatory Modernization Act, 2007*

Decision Information:

Registry Number: RH06E0001
Proposal Posted: June 16, 2006
Decision Posted: September 17, 2007
Comment Period: 60 days (June 16-August 15)
Number of Comments: 11
Decision Came into Force: January 17, 2008

Regulation Proposal under the *Regulatory Modernization Act, 2007*
Registry Number: 010-2220
Information Notice Posted: January 8, 2008
Comment Period: 45 days (January 8 - February 3)
Decision Came into Force: April 4, 2008

Description

In June 2006, the Ministry of Labour (MOL) posted a proposal notice on the Environmental Registry for Bill 69, the *Regulatory Modernization Act* (*RMA*). The ministry's aim for the proposed Act was to enhance the way ministries and government agencies collect, use and share certain information for "specified regulatory compliance purposes."

The *RMA* was introduced for First Reading on February 27, 2006, more than three months prior to the posting of the Registry proposal notice. The *RMA* received Royal Assent on May 17, 2007 and came into force on January 17, 2008.

On January 8, 2008, MOL posted an information notice for the proposed regulation under the *RMA*. The regulation is required to enable key provisions of the *RMA*. Ontario Reg. 75/08 under the *RMA* was filed April 4, 2008.

The *RMA* is part of the Regulatory Modernization Strategy that arose from a government campaign to solicit ideas from members of the Ontario Public Service that would help the government run more efficiently. The proposal was developed by the Inspections, Investigations & Enforcement Secretariat (II&E) of the Ministry of Labour, and the Ministry of the Attorney General.

In Ontario, enforcement of laws is carried out by a number of provincial, federal and municipal agencies, as well as First Nations. Of the 13 provincial ministries responsible for carrying out regulatory compliance activities, nine are prescribed under the *EBR*. According to II&E, these 13 ministries are responsible for overseeing 120 Acts and their accompanying regulations, with approximately 2,000 front-line field staff. The *RMA* is intended to enable staff to work cooperatively, use information more effectively and target enforcement efforts where they are needed most – namely chronic offenders. It is hoped that improved information sharing will alleviate confusion, duplication and burden on businesses and the government, and better protect workers, consumers, and the environment with more effective regulatory enforcement.

Information Collected and its Purposes:
Sections 4 and 5 of the *RMA* outline what information can be collected and by whom, as well as the purposes for which it can be used and shared with other compliance staff. Generally, the information ministries collect and its purposes are restricted to compliance-related materials regarding "organizations". Information on individuals, other than sole proprietors and partners, are excluded. The information can only be collected, used and disclosed to fulfil compliance-related duties such as statistical and risk analysis, to verify accuracy of records, certificate or permit approvals, audits or inspections, administrative proceeding, compliance assessments, and convictions and penalties. This information, including complaints, penalties and conviction records, can be made publicly available on websites or be published under section 10 of the Act.

Information Sharing:
Section 9, also known as the "Heads Up" provision, permits authorized persons performing their duties to make and share observations that may be relevant to the enforcement of another Act or regulation. Observations will be relayed to a person who is responsible for enforcing the other Act.

Section 7 allows a Minister to authorize a person or class of persons to use information collected under a designated Act for the purposes of another designated legislation. The information can only be shared between authorized persons. This provision can be applied retroactively to include information collected before the legislation was designated under the *RMA* or before the *RMA* itself came into force in January 2008. In addition, section 14 allows Ministers to authorize special teams of staff to conduct compliance activities under multiple statutes.

Penalties and Sentencing:
Section 15 permits prosecutors to request a court to consider an offender's previous convictions for failing to comply with regulatory requirements when determining the appropriate penalty for a conviction. The

previous conviction could have occurred prior to the *RMA* coming into force, and the offence could have been committed under a different Act than the conviction under consideration.

Ontario Reg. 75/08 prescribes current legislation and repealed legislation that would be designated for: authorizations to collect, use and disclose information; publication of specified information; and authorizations to exercise functions under multiple Acts or regulations.

Implications of the Decision

The *RMA* was primarily drafted to improve government efficiency in carrying out compliance and to streamline the process for compliant businesses. If the *RMA* functions as its drafters intended, the Act should prove to be a useful tool for environmental compliance and enforcement and because it will strengthen the ability of Ministry of the Environment (MOE) and Ministry of Natural Resources (MNR) to target repeat offenders.

In accordance with the provisions of the *RMA* outlined above, a Ministry of Northern Development and Mines (MNDM) inspector who observes a chemical spill while assessing a factory or a mine site can record their observation and forward their findings to MOE staff who can promptly follow up on the disclosure. Alternatively, a mine that is subject to various types of inspections may be assigned an inspector from a specialized team that is authorized to carry out responsibilities under different Acts belonging to different ministries. One inspector could visit a mine and simultaneously inspect the mining conditions, environmental conditions and state of natural resources, as well as labour practices.

Depending on how the *RMA* is implemented, the Act may alert MOE and MNR staff to environmental problems earlier if other inspectors observe and notify ministry officials of potential infractions. A business may be visited by several different inspectors in a year, which improves the probability that environmental problems are detected and rectified versus MOE or MNR identifying concerns on their own. Early detection is vital for environmental protection because environmental damage may be irreversible and highly costly to remedy. Moreover, these additional inspection opportunities do not necessarily require the mobilization of additional staff and funds since many of these inspections will be done by staff from other ministries. As discussed in the ECO's 2007 Special Report titled "Doing Less With Less", environmental initiatives, and especially compliance activities, suffer from a chronic lack of funding. Inspections under the *RMA* may be a cost-effective approach that can ameliorate some of the resourcing for environmental inspections.

However, it is plausible that the limited resources of MOE and MNR could tempt these ministries to use the *RMA* as a way to avoid committing additional resources for compliance and enforcement initiatives or to further cut back inspection and compliance staff and inappropriately rely on other inspectors to notify them of potential environmental violations. This would undermine environmental protection by reducing the number of inspections performed by staff with environmental expertise. Although inspectors from other ministries may be able to visually identify some environmental infractions, their primary objective is not to search for environmental breaches, and they would not have the needed training in the technical complexities of environmental legislation.

These new powers are intended to ensure that businesses that are compliant are not burdened by repetitive inspections and that repeat offenders do not slip through the cracks. Streamlining the process should help ensure duplication is avoided and money is better spent. Moreover, by making information on a company's convictions and penalties publicly available, ministry staff and members of the public can make informed decisions about who they conduct business with. Furthermore, allowing prosecutors to submit information about previous environmental convictions to the courts may lead to stricter penalties being imposed on repeat offenders.

The ECO notes that a summary of the penalties imposed on Ontario companies and individuals that contravened Ontario environmental laws was published by MOE on its website between the late 1980s and 1999. When MOE stopped publishing this information, Ecojustice (formerly Sierra Legal), began producing a series of investigative reports documenting violations of Ontario's air and water pollution laws. Ecojustice found that as this information stopped being published by MOE, the violations tripled and enforcement has virtually ceased.

In past reports, the ECO itself has commented on the weak enforcement of environmental instruments or legislation. Reasons for this included ineffective provisions and a lack of funding or staff to carry out enforcement activities.

Public Participation & *EBR* Process

Consultations on aspects of this law were first commenced by the II&E in 2001 and 2002. In response to an ECO request, the proposal was posted on the Environmental Registry for 60 days commencing June 16, 2006. The proposal posting included a detailed description of the Bill, as well as a link to Bill 69. MOL received 11 written comments through the Registry posting. The comments were made by a range of commercial associations. The ministry also indicated they held discussions with a number of interested groups since the Bill was introduced in the Legislature on February 27, 2006. They also consulted with the Office of the Information and Privacy Commissioner to ensure that proposed legislation complied with the *Freedom of Information and Protection of Privacy Act*. The ECO is satisfied with MOL's consultation process.

MOL stated that all comments provided on the Bill were considered. MOL included a summary of the comments and its responses in its decision notice. While most of the commenters supported the intentions of the Bill, concerns were expressed about many provisions of the *RMA*.

Collection and Publication of Information:
Commenters felt that sections 4 and 5, and related provisions, outlining the types of information and the purposes for which it can be collected, used and shared was too broad. An association representing vehicle manufacturers stated that "To include these types of information could unnecessarily place at risk business confidential information and discourage organizations from improving their performance by conducting self-assessments and collecting metrics on their performance."

Commenters were also concerned about section 10 and the potential publication of confidential business information and complaint-related information, as well as the length of time information remains on government websites. An association of financial corporations asserts that "...publishing information regarding alleged complaints that have not been verified, or non-compliance with designated legislation that has not been confirmed, is denying an organization the due process it should be afforded." A coalition of industry associations expressed concern that "complaints could prove to be unfounded and, if unfounded complaints were published, damage to a company's reputation would be irreparable."

In addition, commenters were concerned about retroactivity applying to the collection, use, disclosure and publication of information collected prior to the Act coming into effect. It was suggested that limits should be placed on this information. An association of retailers stated that they "feared that this significant authority may inadvertently penalize compliant companies, particularly those with a long history of business operations in the province."

Information Sharing:
One stakeholder group expressed fear that section 9 may allow inspectors to conduct "fishing expeditions" during the course of their investigation, and the safeguards in place were weak. An association representing Canadian retailers wrote "...authorizing field officers to make observations – visual or otherwise – for potential contraventions of a statute under which they have no training is irresponsible and unfair." They go on to say that while the government claims that "... section 9 does not authorize "fishing expeditions", the section does not provide adequate protection against them."

Under section 14 - Multiple Authorizations provision, where a person may be authorized to exercise powers under more than one Act, concerns were raised that this could create "super-inspectors" who lack the requisite expertise and training under the designated statutes. An association representing retailers believed that "...this lofty goal is not achievable without a significant investment in training." Ontario

Power Generation further submitted that "a 'super-inspector'... may not understand the context or nuances of the regulatory environment outside of his/her 'home' legislation."

It was also recommended that ministerial powers should not be delegated below the director level.

Penalties and Sentencing:
Concern was expressed over allowing courts to consider previous convictions under any Act in determining a violator's sentence. Ontario Power Generation noted "not only is it unnecessary to require that offences under entirely different Acts be considered in sentencing under a particular Act, it raises serious questions of relevance and fairness in the sentencing process."

MOL stated that all comments were considered and briefly responded to each of the above noted concerns in the decision notice. Generally speaking, MOL explained that the enacted law accounted for and addressed the concerns expressed by the commenters. MOL stated that the proposed legislation contained the necessary safeguards "to ensure the lawful sharing of information among provincial regulators." For example, MOL stated that the Bill did not expand the types of compliance related information that regulators can collect, and it can only be used for specified compliance-related purposes, which are outlined in the *RMA*. Inspectors are "highly capable and trained professionals" who can only take inspection and enforcement action under authorized statutes. Furthermore, the MOL stated in its decision notice that "the Office of the Information and Privacy Commissioner was consulted and was comfortable with the approach taken" by the *RMA*.

It does not appear that MOL made any significant changes to the Bill as a result of the comments it received.

MOL also invited the public to comment on the proposed regulation under the *RMA*, and provided a 45-day comment period. MOL took the position that the proposed regulation does not need to be posted on the Registry. Instead, it used section 6 of the *EBR* to post the proposal as an information notice.

SEV

MOL failed to provide the ECO with a Statement of Environmental Values (SEV) consideration briefing note, suggesting that MOL did not comply with section 11 of the *EBR*. Section 11 requires the minister to ensure that the SEV is considered when the ministry makes environmentally significant decisions. MOL did provide a copy of its SEV, which outlines MOL's mission to maintain and promote safe and healthy work environments. It endorses the purposes of the *EBR* and commits to integrating them when conducting its business. MOL also states it will co-operate with other ministries as they fulfil their environmental responsibilities and will continue to look for new ways within its mandate to contribute to the environmental well-being of the province. The *RMA* does not appear to conflict with the objectives of the ministry's SEV.

Other Information

At a meeting in February 2006, between the ECO and MOL, MOL representatives assured the ECO that the proposed *RMA* would be posted on the Environmental Registry for consultation. On February 27, 2006, MOL tabled Bill 69, the proposed *RMA*, but did not post the proposal on the Registry. The ECO contacted MOL to inquire into when the proposed Act would be posted. MOL responded by stating it would be posted on the Registry in March 2006, however, the proposal notice did not appear on the Registry until June 16, 2006.

Among other things, the *RMA* resolved a barrier to information sharing found in a provision relating to confidential matters in the *Environmental Protection Act (EPA)*. Section 168(1) of the *EPA* prohibited the sharing of information between provincial officers who do not administer the *EPA*. Section 168(1) states that:

> Except as to information in respect of the deposit, addition, emission or discharge of a contaminant into the natural environment, *every provincial officer shall preserve secrecy in respect of all matters that come to his or her knowledge* in the course of any survey, examination, test or inquiry under this Act or the regulations and shall not communicate any such matters to any person except,
> (a) as may be required in connection with the administration of this Act and the regulations or any proceeding under this Act or the regulations;
> (b) to the provincial officer's counsel; or
> (c) with the consent of the person to whom the information relates. *(Emphasis added).*

Section 168(1) has been amended by the addition of a clause under sub-section (a) that states "(a.1) as authorized under the *Regulatory Modernization Act, 2007*;"

In contrast, section 11 of the *Freedom of Information and Protection of Privacy Act* (*FIPPA*) states:

> Despite any other provision of this Act, a head shall, as soon as practicable, disclose any record to the public or persons affected if the head has reasonable and probable grounds to believe that it is in the public interest to do so and that the record reveals a grave environmental, health or safety hazard to the public.

When it comes into force, it is hoped that the *RMA* should resolve most of the concerns associated with provincial officers sharing information with staff from different ministries. It also assists MOE in meeting its stated policy of improving environmental monitoring and enforcement activities for numerous environmental matters such as post-Walkerton source water protection.

As part of the province's broader modernization strategy to improve and modernize regulatory compliance in Ontario, MOL launched two pilot small business compliance information centres ("CIC"). The Auto Body Repair Compliance Information Center and Plastics Compliance Information Centre were set up to make it easier for companies operating in each sector to understand and manage their regulatory obligations. The program involved the creation of a website for each centre where business owners can access the necessary regulatory information and resources from different ministries that pertain to their sector.

In addition, the Strategy also aims to publicly profile businesses that exceed compliance requirements, as well as target those who commit serious repeat violations through increased inspections and sentencing considerations. These initiatives will also be combined with investigation and compliance-based training.

ECO Comment

The consultative process conducted with stakeholders was adequate and it appears that their concerns were addressed by the safeguards within the statute. Furthermore, the ECO is pleased that the MOL consulted with the Information and Privacy Commissioner to ensure the *RMA* meets privacy standards.

The ECO praises MOL for striving to improve regulatory enforcement activities across ministries. Although greater environmental protection is an anticipated benefit of the *RMA*, it is unclear to what extent the environment will gain from this legislation since the environment was not the primary consideration of the drafters. Nevertheless, the ECO is cautiously optimistic that the *RMA*, if used properly, will improve environmental enforcement. To ensure these benefits are realized, the ECO urges MOE and MNR and other prescribed ministries such as MNDM to work with MOL to draft comprehensive practice guidelines for authorized staff. The guidelines and associated training for ministry staff should promote the early detection and reporting of environmental problems. MOL and prescribed ministries should also ensure that key environmental laws are designated under the *RMA*, and that ministry staff are authorized to collect, use and share information pertaining to these Acts.

The ECO commends MOL for including provisions in the *RMA* which will allow for the targeting of repeat offenders. Allowing courts to consider past convictions under any designated Act when deciding the penalty for a company convicted under an environmental legislation, further strengthens environmental enforcement and sends the message that environmental offences will not be tolerated in Ontario. The ECO is also supportive of the publication of records outlining convictions and penalties imposed by the courts on companies. The ECO supports increased transparency and we believe that making this information publicly available may assist members of the public make informed consumer and business decisions and place pressure on repeat offenders to improve their compliance record.

The ECO is hopeful that the Act could facilitate greater information sharing between ministries and their staff in regard to environmental concerns. Information sharing could be complemented by greater inter-ministerial collaboration so that comprehensive plans are put in place to prevent or mitigate complex, multi-layered environmental concerns. Having ministries work together on enforcement and compliance matters is a positive inter-ministerial initiative, and if implemented effectively the environment could benefit from added enforcement support.

However, the ECO strongly cautions MOE and MNR against using this legislation to undermine their enforcement and compliance activities. These activities are currently under-resourced and under-staffed. Furthermore, the ECO strongly believes that inspectors with environmental expertise should investigate environmental matters. The ECO is skeptical, as are many of the commenters, that super-inspectors (e.g., those who are authorized to operate under several different Acts) will possess the requisite expertise to be able to adequately protect the environment, worker safety and the public interest. The ECO will continue to monitor inspection and compliance activities to ensure that this legislation is not abused.

Review of Posted Decision:

4.19 To Make Regulations under the *Provincial Parks and Conservation Reserves Act*

Decision Information:
Registry Number: 010-0102
Proposal Posted: April 3, 2007
Decision Posted: September 4, 2007
Comment Period: 30 days
Number of Comments: 115
Decision Implemented: September 4, 2007

Description

In June 2006, the *Provincial Parks and Conservation Reserves Act* passed third reading in the Ontario Legislature and was given Royal Assent. This law modernizes the purposes and objectives for protected areas under the jurisdiction of the Ministry of Natural Resources (MNR). Most notably, this law directs that the "maintenance of ecological integrity shall be the first priority" in all aspects of the planning and management of Ontario's protected areas. Before this new law could come into force, MNR had to develop an initial new set of regulations for provincial parks and conservation reserves. This regulatory framework governs 329 provincial parks and 292 conservation reserves which cover almost 94,000 km^2 of Ontario.

In April 2007, MNR proposed the creation of seven regulations under the *Provincial Parks and Conservation Reserves Act*. These proposed regulations were intended to provide management direction, designate legal boundaries, set fees, administer work permits, and allow for specific exemptions for mechanized travel in wilderness class parks. Most of the content of the proposed regulations was carried forward from the old regulatory framework, when provincial parks were regulated under the (now repealed) *Provincial Parks Act* and conservation reserves were regulated under the *Public Lands Act*. All of the regulations were to be authorized by the Minister of Natural Resources, except the two regulations specifically addressing the general provisions of protected areas which were to be authorized by Cabinet.

In July 2007, these seven regulations were filed with the Registrar of Regulations and published in the Ontario Gazette. The *Provincial Parks and Conservation Reserves Act* came into force in September 2007. The regulations now in effect under the Act are:

- O. Reg. 347/07 (Provincial Parks: General Provisions)
- O. Reg. 319/07 (Conservation Reserves: General Provisions)
- O. Reg. 315/07 (Designation of Conservation Reserves)
- O. Reg. 316/07 (Designation of Provincial Parks)
- O. Reg. 346/07 (Mechanized Travel in Wilderness Parks)
- O. Reg. 344/07 (Fees)
- O. Reg. 345/07 (Work Permits)

Beyond these seven regulations, the *Provincial Parks and Conservation Reserves Act* grants the Lieutenant Governor and the Minister of Natural Resources the authority to make regulations on a range of aspects related to the creation, planning, and management of protected areas. This regulation-making power includes, but is not necessarily limited to: classifying provincial parks, setting management directions, prohibiting activities, and prescribing the objectives for aquatic class parks.

Implications of the Decision

Ontario Reg. 347/07 (Provincial Parks: General Provisions) and O. Reg. 319/07 (Conservation Reserves: General Provisions) establish some rules and prohibited activities pertaining to the use of protected areas. These regulations are intended to protect the natural environment, and include provisions prohibiting the harming or killing of flora and fauna without express permission. They also regulate facets of protected area management including conduct, camping, and some recreational activities.

Ontario Reg. 347/07 (Provincial Parks: General Provisions) addresses some of the allowable and appropriate activities in provincial parks. This regulation often addresses select recreational activities as they apply to individual provincial parks, but does not establish a framework to assess such activities. Although the maintenance of ecological integrity is now the legal and scientific standard by which to assess allowable activities, this regulation deals with the issue in an *ad hoc* manner. For example, O. Reg. 347/07 (Provincial Parks: General Provisions) prescribes that:

- jet-skiing is prohibited in Algonquin and Sandbanks Provincial Parks, but the regulation is silent on its appropriateness in other provincial parks.
- ATVs and snowmobiles are generally prohibited in all provincial parks, unless the park superintendent is "of the opinion" the maintenance of ecological integrity is not "impeded." The regulation does not prescribe that this opinion be rationalized in the management direction for a provincial park or by any set standards. Some form of ATV use is currently allowed in 114 provincial parks and some form of snowmobiling is currently allowed in 135 provincial parks.
- power boats are prohibited, except in the 95 provincial parks where specific exemptions by regulation have been granted based on historical approval for the activity.
- aircraft landings are prohibited, except in the 73 provincial parks where specific exemptions by regulation have been granted based on historical approval for the activity.

Ontario Reg. 347/07 (Provincial Parks: General Provisions) and O. Reg. 319/07 (Conservation Reserves: General Provisions) support the legislative intent that hunting is an allowable activity in all conservation reserves by default and in provincial parks by exception. These regulations specify that any allowable hunting must be in accordance with the *Fish and Wildlife Conservation Act*, the federal *Migratory Birds Convention Act*, and the federal *Fisheries Act*. The regulations do not specify the need to comply with the *Endangered Species Act, 2007*.

The regulations are silent on any specific protections for species at risk. However, MNR policy prohibits the hunting and trapping of all species at risk in all provincial parks, unless a special exemption is issued for species of special concern. A second MNR policy then exempted the eastern wolf, a species of special concern, and allowed them to be hunted and trapped in provincial parks. These provisions and its exceptions are not reflected in these regulations, the *Provincial Parks and Conservation Reserves Act*, the *Endangered Species Act, 2007* or the *Fish and Wildlife Conservation Act*.

Ontario Reg. 346/07 (Mechanized Travel in Wilderness Parks) is the regulatory mechanism to allow exemptions for mechanized travel in wilderness class parks. Ontario's protected area system has eight wilderness class provincial parks: Killarney, Lady Evelyn-Smoothwater, Kesagami, Polar Bear, Quetico, Wabakimi, Woodland Caribou and Opasquia. The stated objective of a wilderness class park in the *Provincial Parks and Conservation Reserves Act* "is to protect large areas where the forces of nature can exist freely and visitors travel by non-mechanized means, except as may be permitted by regulation, while engaging in low-impact recreation to experience solitude, challenge and integration with nature."

Mechanized travel is defined as "using a vehicle, as defined in the *Highway Traffic Act*, a motorized snow vehicle, a boat, an aircraft or any other apparatus propelled by machine or by means of machinery." Ontario Reg. 346/07 provides numerous exemptions for this non-conforming use, including allowing aircraft landings in all or parts of every wilderness class park and various locations for powerboat use in all but one park. The superintendent of a park may establish conditions for such travel, including the consideration of the maintenance of ecological integrity. This regulation does not specify how this consideration is methodically assessed or whether this assessment is to be included in the management direction for the park.

Despite these various regulated exemptions for non-conforming uses, it is MNR's position that further exceptions, restrictions and refinements can be made in the individual management direction for each protected area. For example, while the recently approved management plan for Woodland Caribou Provincial Park deems snowmobiling as "inconsistent with wilderness park policy" and directs its phase-out, other non-conforming activities are permitted to continue within this same park.

Public Participation & *EBR* Process

In April 2007, MNR posted a proposal notice on the Environmental Registry to invite public input on the development of seven new regulations under the *Provincial Parks and Conservation Reserves Act*. The ministry posted the proposed regulations for a 30-day comment period, receiving 115 comments including 19 submitted online through the Environmental Registry website. The following summary of comments is illustrative of some of the issues that were raised.

Many comments suggested that the proposed regulations should be expanded to more broadly incorporate provisions related to the maintenance of ecological integrity. They stated that these changes were necessary to reflect the objectives and principles of the *Provincial Parks and Conservation Reserves Act*. Some comments also expressed concern that the proposed regulations did not sufficiently control inappropriate activities within protected areas, such as the need to limit motorized vehicle access as well as to prohibit commercial timber harvesting in Algonquin Provincial Park.

The Ontario Federation of Anglers and Hunters (OFAH) commented that a 30-day public consultation period was an insufficient length of time to thoroughly evaluate the seven proposed regulations. This organization asserted that their ongoing concerns had been inadequately considered in the development of the *Provincial Parks and Conservation Reserves Act* (Bill 11) and the OFAH had been led to believe that it would enjoy a higher level of participation in formulating the new regulations under the Act. The main concern of this organization was that the proposed regulations were "unnecessarily restrictive," specifically with regard to hunting and access issues.

The Wildlands League and Sierra Legal Defence Fund (SLDF; now called Ecojustice) expressed strong support for the *Provincial Parks and Conservation Reserves Act*, but they stated that the proposed regulations "poorly reflect the importance of EI [ecological integrity] as the main objective of protected areas management in Ontario." These organizations stated that the term "ecological integrity" was only present once in the more than 100 pages of the seven proposed regulations. The Wildlands League and SLDF feared that with the absence of this concept, Ontario Parks staff will not be given the necessary direction to maintain and restore ecological integrity as required by the law. These two organizations also expressed concerns with motorized access in protected areas, as well as with commercial timber harvesting in Algonquin Provincial Park.

The Attawapiskat First Nation commented that the timing of the 30-day comment period conflicted with the community's cultural break and other priorities at that time. This First Nation also stated that there should have been more meaningful consultation regarding the provisions of the proposed regulations that affect Polar Bear Provincial Park since this protected area is within their traditional territory.

The Association of Youth Camps on Temagami Lake (AYCTL) expressed concern with specific provisions in one of the proposed regulations (later approved as O. Reg. 347/07). This association was concerned with the proposed provisions that limit the number of occupants of an interior campsite to nine non-related persons, unless otherwise designated by a superintendent based on the carrying capacity of the campsite. The AYCTL stated that the Temagami campsites have a history of being occupied by up to 14 campers and have been well-maintained by AYCTL members. This association proposed that a specific exemption be incorporated into the regulation to apply to campsites around the Temagami area.

Earthroots commended the new law governing protected areas, but it stated that provisions addressing ecological integrity should be more explicitly embedded within the proposed regulations. This organization expressed concern that sport hunting continued to be an allowable activity in the majority of protected areas. Earthroots also stated that there should be further restrictions on motorized access and roads as they impair ecological integrity. This organization asserted that buffer zones should be established around protected areas to limit external impacts on the ecological integrity of provincial parks and conservation reserves.

The Northern Ontario Tourist Outfitters Association (NOTO) commented that the use of aircraft should not be regulated in the same fashion as other types of mechanized travel in wilderness class parks. This association stated that including "aircraft access in the same category as snowmobile or ATV access does not reflect the reality of the real and perceived impact of the various forms of travel."

The Ottawa Valley Chapter of the Canadian Parks and Wilderness Society (CPAWS-OV) stated that the proposed regulations insufficiently incorporated ecological integrity as a management principle. This organization also commented that the numerous exemptions that are applied in the proposed regulations to mechanized travel in wilderness class parks are inconsistent with the intent of the overall legislation.

MNR revised the proposed regulations in light of the comments that it received, as well as to make a number of minor technical corrections. Most significantly, the ministry revised the proposed regulations with clarified language to better reflect its legislated priority to maintain ecological integrity. However, MNR did not make any revisions to the proposed regulations with regard to appropriate activities or new prohibitions since it believes its proposal was "consistent with longstanding policies" and that "such changes should not occur through implementation of new regulations."

SEV

MNR considered its Statement of Environmental Values (SEV). The ministry stated that its proposal would contribute to the environmental, social and economic well-being of Ontario through the sustainable development of natural resources.

ECO Comment

The ECO commends MNR on its new direction, now set out both in law and by regulation, to maintain the ecological integrity of Ontario's protected areas. Protected areas are the anchors by which to conserve the province's biological diversity. They also demonstrate to the public the government's commitment to the natural environment. The regulations and policies that flow out of the *Provincial Parks and Conservation Reserves Act* are valuable tools to help fulfill this important responsibility.

The next important step for MNR will be to prepare the necessary policies to safeguard ecological integrity. The law requires the preparation of a new planning manual by September 2009, which will contain detailed policy directions for provincial parks and conservation reserves. The ECO will review this manual in a future Annual Report.

The ECO believes that MNR should work toward phasing out inappropriate and non-conforming uses of protected areas over time and as opportunities arise. This compliance with the principles, purpose, and objectives of the over-riding legislation can be achieved through the development of new regulations and policies that support ecological integrity. Further, the ECO noted in our 2006-2007 Annual Report that "MNR should ensure that each management direction contains a description of how visitor use stresses the protected area's ecological integrity and how such stresses are being mitigated or eliminated."

Allowable activities, including their level of intensity and timing, should be rigorously screened based on their appropriateness with respect to ecological integrity. The *Provincial Parks and Conservation Reserves Act* clearly directs that recreational opportunities should be both "compatible" and "ecologically sustainable." Due to the sheer number of provincial parks coupled with the historical lack of an ecological mandate, there are many non-conforming activities that merit new scrutiny and should be discontinued if warranted in order to conform to the intent of the law.

Although MNR policy specifies deadlines for the phase-out of several non-conforming uses from provincial parks, the approved regulations are silent on these commitments. For example, MNR policy directs that commercial trapping will be phased out of all provincial parks by no later than January 2010. Additionally, MNR policy also directs that all leases for privately occupied cottages in Algonquin and Rondeau Provincial Parks will not be renewed upon their expiry date in 2017. The ECO previously noted in our 2006-2007 Annual Report that the phasing out of non-conforming activities should be reinforced by regulation and not left to the discretion of policy.

The *Provincial Parks and Conservation Reserves Act* requires MNR to publicly release an assessment on the state of Ontario's provincial parks and conservation reserves by the year 2012. This 'state of the parks' report will include an assessment of the known threats to the ecological integrity of provincial parks and conservation reserves. The ECO expects this assessment should involve a review of non-conforming activities and the steps that MNR is taking to systematically address them. The ECO believes that MNR should ensure that it has sufficient resources and the necessary baseline information well in advance of the release of this report in four years time.

Review of Posted Decision:

4.20 O'Donnell Point Provincial Park Management Plan and Crown Land Disposition

Decision Information:

Registry Number: PB01E3011
Proposal Posted: September 24, 2001
Decision Posted: May 18, 2007
Comment Period: 65, 73, 60, 60, 45 days
Number of Comments: 350
Decision Implemented: May 18, 2007

Description

In September 2001, the Ministry of Natural Resources (MNR) initiated a review of the management direction of O'Donnell Point Provincial Park. A month later, MNR informed the public that this review also would consider the disposition of Crown land to the Moose Deer Point First Nation (MDPFN). MNR stated that this disposition would potentially involve some lands within the park itself, thereby necessitating a realignment of the park boundary. In May 2007, MNR released its approved management plan for the park, as well as its preferred course of action for the disposition of Crown lands.

O'Donnell Point Provincial Park is situated on Georgian Bay between Port Severn and Parry Sound. It was established as a "nature reserve" class provincial park in 1985, covering 875 hectares. The purpose of this class of provincial park is to represent and protect distinctive natural habitats and landforms. O'Donnell Point Provincial Park is a non-operating park with no visitor facilities. Recreational camping always has been prohibited and day-use is discouraged "due to the sensitivity of the park's natural values."

MNR states that this provincial park has nationally and provincially significant biological features, as well as earth science features of provincial significance. According to the ministry, the protected area contains 473 species of vascular plants, including 34 provincially rare species and species at risk. Almost 100 species of birds inhabit the park. There also are 31 species of reptiles and amphibians, including 10 that are listed as species at risk. MNR states that there are 17 species of mammals within the provincial park, likely including eastern wolves that also are classified as a species at risk.

The Moose Deer Point First Nation live on a reserve, also known as Moose Point No. 79, adjacent to O'Donnell Point Provincial Park. The people of Moose Deer Point are descendents of the Pottawatomi of the American Mid-West, having settled in Ontario in the 1830s after a promise of land by the British for fighting on their behalf in the War of 1812. In 1917, the reserve was officially surveyed and the Government of Ontario vested three separate parcels of land totalling 619 acres to the Government of Canada for the use of the Moose Deer Point First Nation.

An inquiry conducted by the Indian Claims Commission in 1999 concluded that the promises made by the British amount to a treaty, although the inquiry concluded that further research should be undertaken by both the Government of Canada and the Moose Deer Point First Nation to verify whether all the promises have been fulfilled. This inquiry found that the Crown would not have expected the Moose Deer Point First Nation "to continue their traditional hunting, trapping, and fishing activities on a severely limited land base like the three parcels, totalling 619 acres, which members of the First Nation were given in 1917 to maintain their homes and gardens." The inquiry concluded that "the parties must have expected that the Indian participants in the council of 1837 would make wide use of unsettled and undeveloped territories to exercise their traditional rights protected by the treaty."

In 1966, the Moose Deer Point First Nation submitted a request to the Government of Ontario to acquire Crown land adjacent to their reserve. The Government of Ontario indicated it would consider conveying approximately 375 acres to the Moose Deer Point First Nation to connect the reserve's three separate parcels of land. Two years later, the Government of Ontario and the Government of Canada made a decision that no new Crown lands would be allocated to the reserve at that time.

In 1992, the Moose Deer Point First Nation made a request to MNR for it to convey approximately 1,600 hectares (ha) of Crown land to the reserve. The ministry suggested that 190 ha could be transferred to the reserve, including some lands within O'Donnell Point Provincial Park. After a lull of five years, both the Moose Deer Point First Nation and MNR began to exchange a series of proposals and counter-proposals between 1997 and 2001. This process led to MNR's proposal on the Environmental Registry to convey some Crown lands to the Moose Deer Point First Nation and alter the boundaries of O'Donnell Point Provincial Park. The actual transfer of Crown lands by MNR is governed by the *Environmental Assessment Act*, including the requirements of MNR Exemption Order 59/2 and MNR Exemption Order 26/7.

Implications of the Decision

Management Plan:

In May 2007, the O'Donnell Point Park Management Plan was finalized by MNR. It will guide the management of the park for the next 20 years. This official policy for the provincial park largely follows the management direction that was laid out in the Interim Management Statement that was developed by MNR in 1998. The primary intent of the management plan is to protect the natural heritage features of the park.

The recreational use of O'Donnell Point Provincial Park will be "actively discouraged" and no hiking trails will be developed. The park management plan prohibits shoreline boat mooring, camping, open fires, snowmobiling, and all-terrain vehicle (ATV) use. Hunting and commercial trapping also are not permitted in this particular park. Commercial fishing is prohibited and sport fishing is not encouraged.

The *Provincial Parks and Conservation Reserves Act, 2006* specifies a number of other activities that are automatically prohibited in this park, beyond what was detailed in the management plan: commercial timber harvesting; the generation of electricity; prospecting and the staking of mining claims; extracting aggregate, topsoil or peat; and other industrial uses.

The management plan states that species inventories and research within the park will be encouraged. Additionally, off-site interpretative programming may be done "to educate people about the sensitivity of the park's natural features to human disturbance." All forest fires will be suppressed because of the extent of development (i.e., the Moose Deer Point First Nation, cottages, etc.) adjacent to the park and due to the significant natural values of the park.

MNR policy allows for three possible land use zones within a nature reserve class park: access, nature reserve, and historical. Zoning assists in the management of the park and each type of zoning allows for certain acceptable activities to potentially be permitted. Almost the entire park is composed of a nature reserve zone to "protect the significant natural features of the park." A small access zone, approximately 0.1 ha in size, is located near the western tip of the park and it will include a small floating dock.

Disposition of Crown Land:

The management plan states that three possible alternatives exist for the disposition of a portion of the park to be conveyed to the Moose Deer Point First Nation. MNR's preferred option involves the disposition of 160 ha of the park along Twelve Mile Bay, the disposition of 103 ha of Crown land adjacent to the eastern boundary of the current reserve area, and the addition of 180 ha of Crown land to the regulated area of the park. The ministry's preferred alternative does not include the 20m (66') shoreline road allowance along Twelve Mile Bay as part of the proposed disposition.

The three alternatives are discussed at length in MNR's "Supplement to the Final Environmental Study Report for O'Donnell Point" (2007). MNR states that this supplemental document addressed the multiple requirements of the *Environmental Assessment Act*. The actual disposition of Crown lands will not be posted on the Environmental Registry as this facet of MNR's proposal is addressed under the *Environmental Assessment Act*.

Moose Deer Point First Nation Land Use Plan:

The Moose Deer Point First Nation has concurrently developed a Land Use Plan (2004) that was amended based on the ministry's proposed disposition of Crown lands. MNR describes this planning document as striving "to achieve the dual aim of protecting sensitive areas while providing sufficient developable areas to meet the community's future needs." The ministry also states that the controls and restrictions on land uses within the plan "meet or exceed municipal and/or provincial restrictions" and that these standards "will prevent any potential impacts to water quality from any future developments and mitigate impacts from current uses." The proposed 180 ha addition to O'Donnell Point Provincial Park will not be contiguous with the existing boundaries of the park, but the intervening Moose Deer Point First Nation land is zoned for protection in the Land Use Plan.

MNR states that the Moose Deer Point First Nation is in the process of obtaining legal authority under the *First Nation Land Management Act* that would require it to develop and approve a land code. This authority would replace the land administration provisions under the *Indian Act*, allowing the Moose Deer Point First Nation to develop and approve their Land Use Plan. As a result, the ministry states that the land use plan would be legally binding and be recognized by the courts.

O'Donnell Point Notification Protocol:

The O'Donnell Point Notification Protocol also was ratified in 2004. It is a non-binding agreement between the District Municipality of Muskoka, the Township of Georgian Bay, the Township of the Archipelago, the Moose Deer Point First Nation, and MNR. The ministry states that this protocol is only the second of its kind in the province and it "provides direction for notification between the said parties on proposed transactions under their responsibility (e.g., zoning, roads, residential, commercial or industrial developments, or amendments to the park management plan)."

Ecosystem Protection Group:

An Ecosystem Protection Group also was formed in 2004. It is an advisory body composed of stakeholders such as the Moose Deer Point First Nation, cottagers, and government staff. MNR states that the purpose of this group is to assist in the ongoing conservation of the O'Donnell Point ecosystem, while also providing an ongoing forum to discuss and address environmental issues.

Public Participation & *EBR* Process

In September 2001, MNR posted a proposal notice on the Environmental Registry to invite public input on the development of a management plan for O'Donnell Point Provincial Park. Shortly thereafter, the ministry amended its proposal to include the potential disposition of Crown land to the Moose Deer Point First Nation. Over a six-year period, MNR undertook public consultation in four phases: terms of reference; background information, issues and options; preliminary park management plan; and the final approved park management plan. In May 2007, the ministry posted its decision notice on the Environmental Registry.

MNR extensively used the Environmental Registry as part of its public consultation, including updating its original proposal notice and extending individual comment periods when warranted. Over the course of six years, this proposal notice was revised and re-posted to allow for comment periods of 65, 73, 60, 60 and 45 days respectively. The ministry also placed advertisements in local newspapers, held public open houses, and did several mail-outs of information to hundreds of individuals and organizations. The ministry received 350 comments on its proposal over the course of six years. The following summary of comments, provided on the revised notice posted in late 2005, is illustrative of the issues that were raised.

The Township of the Archipelago commented, "In general, we are supportive of the efforts by Ontario Parks, OMNR, and MDPFN to address concerns raised during the consultations. The proposed disposition would appear to potentially enhance the quality of O'Donnell Point Provincial Park and benefit the local community of Moose Deer Point." The Township specifically supported MNR's preferred alternative to dispose of three parcels of the provincial park and three parcels of Crown land, while adding a new parcel of Crown land to the provincial park.

The Wah Wah Taysee Association stated that their primary concern has always been the preservation in perpetuity of the provincial park. This association stated that it supported the 180 ha addition to the provincial park and the disposition of 160 ha of Crown land to the Moose Deer Point First Nation. The Wah Wah Taysee Association also stated that the Ecosystem Protection Group should be "privy to the information exchanged under the Notification Protocol and to the Details of the Land Use Plan" for these mitigation measures to be successful. This association stated that all policies related to the provincial park should address water quality issues in Twelve Mile Bay.

The Ontario Federation of Anglers and Hunters "strongly opposed" the proposed 180 ha addition to the provincial park being classed as a nature reserve. This organization was concerned that this designation would restrict hunting in this area on what historically was Crown land that was open to hunting. The Ontario Federation of Anglers and Hunters stated this designation was "unacceptable."

The Twelve Mile Bay Association stated that MNR had "not satisfactorily addressed the concerns of the non-First Nations peoples living in and around Twelve Mile Bay." The association expressed concerns with MNR's reliance on the Moose Deer Point First Nation Land Use Plan as mechanism to address environmental issues resulting from the proposed disposition of Crown land. The association also expressed concern with the public consultation in the development of that plan and that the land use plan held no legal weight. The association also stated that Twelve Mile Bay is presently "overdeveloped" with significant water quality issues and that no further shoreline development should be allowed. Partly as a result of such concerns, the Twelve Mile Bay Association commented that it made a "bump-up" request to the Ministry of the Environment that an individual environmental assessment should be conducted on the land transfer as it was unsatisfied with the existing process.

The Wildlands League and Ontario Nature supported the proposed land disposition and alteration of the boundaries of O'Donnell Point Provincial Park. These organizations stated that the ministry's preferred course of action "represents an outstanding example of a negotiated solution that addresses the aspirations of the local community while providing for continued protection of significant habitats." These organizations also stated that the proposed Crown land disposition process was consistent with the principle of "no net loss of protected area." However, these organizations commented that "the existing cottage infrastructure in Twelve Mile Bay poses significant potential environmental impact – such as the effects of shoreline development and septic systems."

The Sans Souci and Copperhead Association supported the proposed land disposition and alteration of the boundaries of O'Donnell Point Provincial Park. This organization commented, "had the First Nation's 1966 request for Addition to Reserve been approved prior to the 1985 establishment of the Nature Reserve, the park boundaries would have been very different from the existing; so it seems not unreasonable that the Park be reconfigured to accommodate the Addition to Reserve as long as precedents are not set and the Park remains with at least equivalent value." This organization commented that the Moose Deer Point First Nation "have been good stewards of the wetlands within their jurisdiction according to several environmental studies." This organization also commented that water quality issues will exist in Twelve Mile Bay "whether or not there is a land transfer." However, the Sans Souci and Copperhead Association stated that the notification protocol and the ecosystem protection group that have been developed "may in fact point to a solution" for some of the issues.

The Manitou Association supported the proposed addition of 180 ha of Crown land to O'Donnell Point Provincial Park and that the protection of more lands was "critical." However, this organization commented that while it commends the sincere commitment to protect environmentally sensitively lands by the Moose Deer Point First Nation, it notes that "this could change at any time in future, with no recourse under current provincial law." This organization "whole-heartedly" supported that Crown land be transferred to the Moose Deer Point First Nation, but argued that any such lands not be from the area currently regulated as a provincial park.

SEV

MNR considered its Statement of Environmental Values (SEV). The ministry stated that its proposal would contribute to the "environmental, social and economic well-being of Ontario through the sustainable development of natural resources." MNR notes that "as part of the park management planning process, extensive public consultation above and beyond the minimum requirements has been conducted."

ECO Comment

The ECO believes that the O'Donnell Point Provincial Park Management Plan and the related Crown land disposition are a success story. MNR diligently worked toward a solution that will benefit both a protected area under its jurisdiction and a local First Nation community. As one commenter noted, this initiative has produced a "win-win" result.

Valid concerns have been raised with regard to the effects of new and existing development along Georgian Bay, specifically with regard to the impairment of water quality. While this park management planning and land disposition process were not specifically intended to address water quality issues, they do afford the possibility of making a positive contribution to the broader issue of watershed management. MNR's use of an adaptive management approach will potentially aid the ministry in being responsive to issues in and around O'Donnell Point Provincial Park. Additionally, the participation of local residents on an ecosystem protection group and the use of the O'Donnell Point Notification Protocol relating to development issues will likely assist in addressing broader environmental issues that concern all local residents.

The ECO encourages MNR to actively explore co-management opportunities for O'Donnell Point Provincial Park with the Moose Deer Point First Nation. These opportunities could include a collaborative partnership to monitor and manage the wildlife, fisheries, and vegetation in the park, as well as undertaking the identification of cultural resources. Partnerships of this nature would benefit both protected areas and local communities.

Shortly after this management plan was approved, the law governing Ontario's protected areas law was changed. The *Provincial Parks and Conservation Reserves Act, 2006* prescribes that the maintenance of ecological integrity now will be the first priority in the planning and management of protected areas. Historically, little legal direction was given to the purpose of protected areas. The ECO believes that the O'Donnell Point Park Management Plan meets the intent of this new law.

Review of Posted Decision:

4.21 Integrated Management Planning for Five Provincial Parks, Eight Conservation Reserves and Crown Land Recreation in the Temagami Area

Decision Information:

Registry Number: PB04E2003	Comment Period: 51, 59, 45, 57 days
Proposal Posted: June 25, 2004	Number of Comments: 948
Decision Posted: August 9, 2007	Decision Implemented: August 9, 2007

Description

In June 2004, the Ministry of Natural Resources (MNR) initiated a planning process to develop the management direction for five provincial parks and eight conservation reserves in the Temagami area. This planning process, termed the Temagami Integrated Planning (TIP) project, also examined the recreational use of the surrounding Crown land. This planning process was initiated to meet commitments made through the approval of the Temagami Land Use Plan (1997). In August 2007, MNR released three approved plans that resulted from this process: a park management plan for five provincial parks in the Temagami area (Lady Evelyn-Smoothwater, Makobe-Grays River, Obabika River, Solace, and Sturgeon River); a resource management plan for the eight conservation reserves that surround the parks (Bob Lake, East Lady Evelyn Lake, Jim Edwards Lake, Makobe Grays Ice Margin, North Yorston, Pinetorch Lake, Smith Lake, and Sugar Lake); and a Crown land recreation plan for Crown lands in the Temagami area.

The Temagami area encompasses roughly 650,000 hectares (ha) 100 km north of North Bay. It is a rugged, remote landscape rich in significant natural, cultural, and recreational resources. Lying in the transition zone between the Boreal and Great Lakes-St. Lawrence forest regions, the area exhibits a range of vegetation types, resulting in a wide variety of tree species and fish habitats. MNR states that there are 25 species at risk in the Temagami area, including the peregrine falcon, the bald eagle, and the eastern cougar. The Temagami region is recognized for its stands of old growth red and white pine ecosystems and the presence of the endangered Aurora trout, a brook trout variant endemic to just two Temagami lakes. Naturally significant features include extensive Aeolian deposits, an extensive peatland complex, and the highest point in Ontario, Ishpatina Ridge.

Many natural features of the Temagami area are sacred sites for local First Nation people, and the landscape continues to hold great cultural, spiritual and economic significance for the Bear Island and

Matachewan communities. For over six thousand years, Aboriginal inhabitants have travelled by way of the *nastawgan*, an interconnected system of winter and summer trails and portages. Moreover, with numerous lakes and rivers and over 2,400 km of interconnecting canoe routes and portages, Temagami has earned a reputation as a leading tourist destination for those seeking the solitude and challenge of a backcountry experience.

In July of 1989, in response to public concern around the use and management of natural resources in the Temagami area, MNR initiated a planning program that resulted in the production of the Temagami Land Use Plan (1997). This plan refined the resource management areas established in the preceding Temagami District Land Use Guidelines and assigned 59 management areas to four different zone types (protected areas, special management areas, integrated management areas, and developed areas). These four zones, together with provincial parks, form the basis for land use in the Temagami area.

In 2004, MNR initiated the Temagami Integrated Planning project, not to create new protected areas or modify the 1997 Temagami Land Use Plan, but rather to implement aspects of the 1997 plan. The Temagami Integrated Planning project incorporated the planning of Temagami provincial parks, conservation reserves, and Crown land since MNR felt that these three planning components share similar patterns of access and use, as well as environmental and social issues. Such issues include unregulated access, all-terrain vehicle (ATV) use on portage trails, problems with boat cache systems, and the maintenance of campsites and portage routes. Furthermore, MNR stated that by integrating the planning components, it was better able to evaluate how management decisions on one land base might affect adjacent areas and to produce a seamless recreational experience for individuals who travel across the three different land use designations.

Of the seven provincial parks subject to the 1997 plan, only the five parks that are physically connected to each other are included in the recently approved Temagami Area Park Management Plan. These five parks consist of Lady Evelyn-Smoothwater Provincial Park – a wilderness class park that forms the "core" of Temagami's protected areas – and four waterway class parks that radiate outward of it. The legal purpose of a waterway class park is to "protect recreational water routes and ... provide high quality recreational and educational experiences." The legal purpose of a wilderness class park is to "protect large areas where the forces of nature function freely and where visitors travel by non-mechanized means and experience solitude, challenge and personal integration with nature."

Ontario's provincial parks are divided into zones, with different zone types having different purposes and allowable activities. The five parks in the Temagami area Park Management Plan are comprised of four zone types: wilderness, nature reserve, access and natural environment. The purpose of wilderness zones is to provide wilderness experiences and protect significant natural and cultural features. In contrast, nature reserve zones function to protect significant earth and life science features, permitting minimal development and facilities. Natural environment zones permit low-intensity recreational activities and access zones serve as staging areas where minimal facilities support access to other zones.

In addition to reaffirming Temagami's existing provincial parks, the 1997 plan identified 16 other protected areas that are now regulated as conservation reserves. The primary objective of conservation reserves is to protect representative ecosystems and biodiversity and to manage these areas to ensure that ecological integrity is maintained. Of the 16 conservation reserves identified in the 1997 plan, only the seven that surround and physically connect to the five core Temagami parks are included in the resource management plan. One additional conservation reserve, Makobe Grays Ice Margin, which was not in the 1997 Temagami Land Use Plan but instead created during the Ontario's Living Legacy planning process, is also included in the resource management plan. In total, these five parks and eight conservation reserves cover what many consider the heart of the Temagami wilderness.

Beyond these protected areas, the 1997 Temagami Land Use Plan also covered over 500,000 hectares of Crown land which are now subject to the Crown Land Recreation Plan and provide a variety of recreational and resource uses. Portions of this Crown land are included in an unresolved land claim settlement with the Temagami Aboriginal community and may be converted into an Indian Reserve and waterway class provincial park. MNR states that "settlement of the Temagami Land Claim is entirely separate from the Temagami Integrated Planning process" and that "management planning for this proposed park will be a separate process."

Implications of the Decision

Shortly after the Temagami Area Park Management Plan, Conservation Reserve Resource Management Plan, and Crown Land Recreation Plan were approved in August 2007, the law governing Ontario's protected areas was changed. While little legal direction was previously given to the purpose of protected areas, the new *Provincial Parks and Conservation Reserves Act, 2006* states that the maintenance of ecological integrity will now be the first priority in the planning and management of protected areas. In accordance with this Act, the resource management plan for the Temagami conservation reserves states that "maintaining the ecological integrity for which specific conservation reserves were created is the first priority when planning and managing conservation reserves." Similarly, the Temagami Area Park Management Plan states that resource stewardship policies for the five parks "will ensure that the overall park objectives are achieved and that ecological integrity takes a priority in park operations and development."

Besides the activities prohibited in the Temagami parks and conservation reserves management plans (see below), the *Provincial Parks and Conservation Reserves Act* specifies a number of activities that are automatically prohibited in these protected areas: commercial timber harvesting; the generation of electricity; prospecting and the staking of mining claims; extracting aggregate, topsoil or peat; and other industrial uses.

The integration of the planning for the three land use designations (parks, conservation reserves, and Crown land) allowed MNR to develop management directives that apply to the Temagami area as a whole. Across the planning area, MNR plans to:

- rehabilitate and maintain campsites, portages, hiking trails and canoe routes to wilderness park standards;
- decommission and rehabilitate unauthorized roads;
- establish managed boat caches to control the number of abandoned or inappropriately cached boats and minimize the introduction of invasive species;
- prohibit ATV use on portage trails;
- distribute information regarding wilderness use "ethics";
- continue consultation with First Nation communities; and
- develop monitoring, assessment, inventory and research programs.

Although the planning components for the three land designations were integrated into one process, each component has distinctive legislation, permitted uses and management requirements. The management plans for each of the three planning components will be reviewed at approximately ten-year intervals and the need for amendments assessed.

Temagami Area Park Management Plan:
The approved park management plan consists of management direction for five provincial parks: Lady Evelyn-Smoothwater (wilderness class), Makobe-Grays River, Obabika River, Solace, and Sturgeon River (all waterway class parks). Although management plans are typically developed for individual parks, in this case MNR created a "parent plan" since the five parks are physically connected to each other and share similar patterns of use. Two other provincial parks in the Temagami area, Finlayson Point and W.J.B. Greenwood, are not included in the Temagami Area Park Management Plan and have an approved park management plan (1985) and interim management statement respectively.

The intent of the Temagami park plan is to "manage visitor use, protect significant natural and cultural resources, and ensure that park operations are environmentally, socially and economically sustainable." Management objectives for the parks include developing park operating plans, a campsite inventory program, a rehabilitation plan for decommissioned forest access roads, and inventory, monitoring, and research programs. Although the land use permits for 19 private recreation camps in the parks were due to expire in December 2009, the park management plan grants the permit holders a lifetime extension.

Lady Evelyn-Smoothwater Provincial Park:
At 76,107 ha, Lady Evelyn-Smoothwater Provincial Park constitutes the bulk of Temagami's protected areas. The Temagami Area Park Management Plan partitions this park into several zones: one core wilderness zone, two nature reserve zones, and six access zones. While angling and backcountry camping are permitted in the wilderness zone, hunting and motorized travel are not – except for motorboats and authorized commercial aircraft landings on specific lakes. The park management plan prohibits angling, hunting, motorized travel and recreational camping in the park's two nature reserves. One of these nature reserves protects the only known habitat of the Aurora trout and the other protects an extensive peatland complex.

The six access zones comprise roughly five per cent of the area of this wilderness class park and several of them permit motorboat, snowmobile, and aircraft landing access deep into the park. Snowmobiles, for example, are permitted on a trail that bisects the western portion of the park. The park plan states that snowmobile use will continue on this trail "until such time as an alternate route is located west of the park." Another access zone permits motor vehicles on a portion of the former Liskeard Lumber Road that extends from the north boundary of the park six kms southward to a staging area for boaters near Gamble Lake. The remaining portion of the lumber road that continues to the southern border of the park will be decommissioned, thereby preventing ATV and snowmobile travel through the park to Jim Edwards Lake Conservation Reserve.

Waterway Class Parks:
The four waterway class provincial parks are comprised primarily of natural environment zones, where motorboats, snowmobiles and aircraft landings are generally permitted. The exceptions are a natural environment zone in Sturgeon River Provincial Park, where snowmobiles are prohibited, and a wilderness zone in Obabika River Provincial Park, where all mechanized travel is prohibited. Hunting is permitted to continue in natural environment zones in the waterway class parks, but is prohibited in wilderness and access zones.

Resource Management Plan for Conservation Reserves:
The approved resource management plan provides the management direction for eight conservation reserves that are physically connected to the five parks. Although nine other conservation reserves are identified in the 1997 Temagami Land Use Plan, they are not included in the resource management plan and are instead guided by individual Statements of Conservation Interest.

In addition to the management directives made for the Temagami Integrated Planning area as a whole (see above), the resource management plan outlines specific directives for the conservation reserves. However, because the intention of the management plan is to fulfill aspects of the 1997 plan, there are few changes to the activities permitted and prohibited within the conservation reserves. Hunting, angling, and aircraft landings will continue to be permitted in all eight conservation reserves, and as in the past, motorboats and managed boat caches will be prohibited in Jim Edwards Lake, Pinetorch Lake, and North Yorston conservation reserves. Snowmobiling will continue to be permitted in all the conservation reserves (although only to the land use permit holder in North Yorston), and all other public motorized access (including ATVs) will continue to be prohibited in Bob Lake, East Lady Evelyn Lake, Pinetorch Lake, and Sugar Lake.

One notable difference between this resource management plan and the 1997 plan concerns public motorized access in Jim Edwards Lake Conservation Reserve; because the park management plan directs the decommissioning of the southern portion of the Liskeard Lumber Road in Lady Evelyn-Smoothwater Provincial Park (see above), motor vehicle and ATV access will no longer be permitted, or even possible, into Jim Edwards Lake Conservation Reserve. Furthermore, while snowmobiling will continue to be permitted within this area, snowmobile access will no longer be permitted from the north.

Temagami Crown Land Recreation Plan:
The Crown Land Recreation Plan addresses only the recreational aspects of Crown land subject to the Temagami Land Use Plan. Other resource management activities that occur on Temagami Crown land, such as mining and forestry, will continue to receive direction from the 1997 plan. In addition to the aforementioned directives that cover the three planning components (e.g., maintenance of recreational facilities, development of a boat cache system, prohibition of ATV use on portage trails), the recreation plan also indicates MNR's plans to promote under-utilized canoe routes and recreation areas and to restrict the use of some campsites to two consecutive nights.

Public Participation & *EBR* Process

In June 2004, MNR posted a proposal notice on the Environmental Registry inviting the public to participate in the Temagami Integrated Planning process and to comment on Terms of Reference. Over the next three years, MNR consulted the public at three stages: background information; management options; and preliminary plans. In August 2007, MNR posted its approved plans on the Environmental Registry for final public inspection.

MNR used the Environmental Registry as part of its public consultation throughout the Temagami Integrated Planning process. In addition, the planning team used news releases, media advertisements, directed mailings, private stakeholder meetings, focus groups, and public information meetings to consult with citizens. Moreover, MNR received Aboriginal input via First Nations membership on the planning team and through consultation at community open houses at Matachewan and Temagami First Nations. Over 948 comments were received during the planning process. The following summary of comments made on the preliminary plans is indicative of the primary issues raised throughout the process.

The Wildlands League, Earthroots, and the Ottawa Valley chapter of the Canadian Parks and Wilderness Society (CPAWS-OV) urged MNR to make ecological integrity a priority when managing provincial parks and conservation reserves. All three groups opposed motorized access zones in Lady Evelyn-Smoothwater Park, arguing that these zones are inconsistent with wilderness park values. CPAWS-OV commented that not only do these access zones "ignore the definition given in Ontario's Approach to Wilderness: A Policy, May 1997, but they also violate the ecological integrity of this undersized Wilderness Park." Other recommendations made by these groups included: rehabilitating decommissioned roads to prevent unauthorized motor access; reducing the maximum horsepower of motorboats in the waterway parks; and expanding the boundaries of the waterway parks to minimize the impacts of deleterious activities occurring adjacent to park boundaries.

The Friends of Temagami, the Nastawgan Network, the Friends of Chiniguchi, the Wilderness Canoe Association, and the Ontario Recreational Canoeing Association (ORCA) also argued that motorized access in wilderness class parks is inappropriate. The Friends of Chiniguchi stated that "It is of the utmost importance that the true definition of a wilderness class park be upheld. Motorized vehicle traffic remains unrestricted throughout more than 90 per cent of the Province of Ontario. It is imperative that some tracts of land be left in their natural, undisturbed state." These groups also requested that decommissioned roads be torn up and rehabilitated and that the *nastawgan*, Temagami's ancient travel routes, be recognized and protected in its entirety

In sharp contrast to these groups, the Temiskaming Municipal Association (TMA) and several of its member municipalities (Cobalt, Hilliard, McGarry, Thornloe, Charlton and Dack) disagreed with the proposed reduction of mechanized access in Lady Evelyn-Smoothwater Provincial Park. The TMA was particularly concerned that the placement of a gate on the Liskeard Lumber Road at Gamble Lake would prevent motorboat access to the Lady Evelyn River. In response to this concern, MNR moved the road's closure point southward to Chalice Creek, thereby "limiting access into the core of Lady Evelyn-Smoothwater Provincial Park while still providing mechanized access to key areas of interest as identified by local users." Nonetheless, the TMA was also concerned that road restrictions prevent snowmobiling through the park into Jim Edwards Lake Conservation Reserve. One TMA member, the City of Temiskaming Shores, acknowledged the need to regulate mechanized access in the park, stating "we…realize that Lady Evelyn Smoothwater Park was created as a Wilderness Class Park in 1987 and as such was not to have had motorized access from that time onward."

The Ontario Federation of Anglers and Hunters (OFAH), the Temiskaming Angler & Hunter Association (TAHA), and the Kirkland District Game and Fish Protective Association all opposed restrictions to motorized access on the Liskeard Lumber Road. These groups requested snowmobile and ATV access through Lady Evelyn-Smoothwater Park into Jim Edwards Lake Conservation Reserve and the Crown land on the other side. The Kirkland District Game and Fish Protective Association and the OFAH also commented that MNR is treating the conservation reserves as wilderness class parks and unnecessarily restricting activities that should otherwise be permitted. This view was also expressed by the Temiskaming Municipal Association. While the TAHA disagreed with the proposed prohibition of ATVs on Crown land portage trails, the Kirkland District Game and Fish Protective Association had no problem with this directive but argued that alternate ATV routes must be provided where old logging roads are designated as portage trails. Both the OFAH and the TAHA disagreed with the proposed phase-out of private land use permits, arguing that since they existed prior to the formation of the parks, the permits should remain.

The Lady Evelyn Cottage Owners and Lake Users' Association felt so strongly about the prospective termination of existing Land Use Permits (LUPs) that it "recommended that the entire planning process be stopped until this issue is resolved."

Matachewan First Nation objected to restrictions in the protected areas and Crown land, commenting "we will not accept any further changes to the Temagami Integrated Planning Area. Status quo will stay status quo without any changes. We want access and usage maintained as is, no further restrictions. We will not accept anything less."

MNR stated that both Temagami and Teme-Augama Anishnabai First Nations (which together comprise the Temagami Aboriginal community) were represented on the planning team and that "both nations are supportive of the direction we have set in the final plans." Moreover, Temagami First Nation expressed an interest in participating in a partnership with MNR to maintain canoe routes and campsites in the area.

Several commenters felt that the plans lacked accountability, explicit actions, timelines, or details of the financial commitment to enforce maintenance initiatives. Some argued that it is not an objective for conservation reserves or Crown land to provide facilities for users.

SEV

MNR considered its Statement of Environmental Values (SEV). The ministry stated that the goal of the Temagami integrated planning initiative was to "promote the environmental, social and economic well-being of Ontario through the sustainable development and use of recreational resources in the Temagami area."

MNR stated that this initiative "incorporated formal public consultation at each stage of the process in an effort to provide those affected by decisions with a real voice in the decision making process."

ECO Comment

The ECO commends MNR for taking a comprehensive approach to planning the management of the Temagami area and encourages MNR to apply a similar approach to future planning processes. Nonetheless, the ECO is puzzled by MNR's exclusion of two Temagami provincial parks and nine conservation reserves from the Temagami plans. Although the ECO recognizes that MNR's objective was to develop plans for adjacent areas with similar patterns of use, the ECO believes that excluding the eleven protected areas leaves land scattered throughout Temagami Crown land with little or outdated management direction. Instead, including all Temagami land in the planning process would have been more comprehensive and would have more fully implemented aspects of the 1997 plan.

In developing the Temagami Area Park Management Plan, MNR tried to strike a balance between the needs of motorized and non-motorized users. MNR stated "Managed access into the parks will balance the needs of existing authorized users with the protection of the wilderness and remote character of the parks," and "the preliminary plan sought to achieve a balance between [those with a desire to see the Liskeard Lumber road open for mechanized use and those that wanted to see the entire road closed to this type of use]." Unfortunately, in attempting to strike this balance, the ECO believes that MNR gave only secondary consideration to what should have been its primary concern: ecological integrity.

The ECO believes that one of the most significant threats to ecological integrity in the Temagami area is ATV, snowmobile, and motorboat travel in Lady Evelyn-Smoothwater Provincial Park since even limited motorized activity can have adverse ecological effects on wildlife (for information on the impacts of mechanized travel, see Part 8.1 of this Annual Report and page 242 of the Supplement to the ECO's 2003-2004 Annual Report). Furthermore, the ECO believes that travel by these means is inconsistent with the intent of wilderness class parks; several MNR policies and the Temagami Area Park Management Plan itself state that a wilderness park is where "visitors travel by non-mechanized means and experience solitude, challenge and personal integration with nature." Accordingly, the approved management plan for another Ontario wilderness class park states "Facilities and motorized transport are items which do not conform with the objectives of wilderness parks and wilderness zones." The ECO believes that the Temagami Area Park Management Plan should recognize that motorboat, snowmobile, and ATV travel are non-conforming activities in a wilderness class park and should phase them out over time.

Although most mechanized travel in Lady Evelyn-Smoothwater Provincial Park occurs in access zones, the ECO believes that the park management plan stretches the intended purpose of these zones. Rather than acting as small staging areas that provide access to other zones, many of the access zones in Lady Evelyn-Smoothwater Provincial Park cut deep into the heart of the park.

The ECO believes that ecological integrity was also given secondary consideration in MNR's decision to grant lifetime extensions to private recreation camp land use permit holders in the Temagami parks. Although the preliminary park plan outlined a phase-out of these permits, MNR abandoned this option in its approved plan after complaints from stakeholders. This illustrates an observation made by the ECO in our 2006-2007 Annual Report (page 105) that despite a clear commitment in MNR policy to phase out land use permits in regulated parks, governments of the day have routinely given in to political pressure and granted extensions. The ECO disagrees with the lifetime extensions and urges MNR to stand firm in its commitment to phase out land use permits in protected areas. The ECO notes that such a commitment was fulfilled by MNR in its management plan for another wilderness class park (Woodland Caribou Signature Site).

In our 2006-2007 Annual Report, the ECO commented that "Ontario's provincial parks and conservation reserves are threatened by numerous stresses, some of which originate beyond their boundaries." This concern is particularly relevant to the new Temagami management plans. First, the ECO believes that the boundaries of the waterway class parks (200 metres from the water's edge), the minimum suggested by MNR policy, are often inadequate to protect the ecological integrity of the rivers from adverse activities along their borders. Second, the ECO is concerned with the potential impacts that adjacent mining leases could have on protected areas. For example, while most of Wakimika Lake is protected by Obabika Provincial Park, three mining leases extend into a small portion of the lake not protected by the park.

The ECO is also concerned that commercial timber harvesting on Crown land adjacent to the parks and conservation reserves may have detrimental impacts on these protected areas. The ECO encourages MNR to use a greater ecosystem approach and consider the potential impacts of external industrial activities on Temagami area parks and conservation reserves. In particular, the ECO hopes that the forthcoming Forest Management Plan for the Temagami Crown Management Unit will address the ecological impacts of forestry on the protected areas and include appropriate buffers zones to mitigate these effects.

The ECO believes that the management and recreation plans lack specifics as to what will be done when and by whom. Given the history of access violations in the Temagami area, the ECO believes the plans should detail exactly how unauthorized motor access will be enforced and how decommissioned roads will be physically rehabilitated. Likewise, the ECO believes that the plans' directives to develop research, inventory, and monitoring programs are vague and noncommittal. The ECO is disappointed that the plans do not more fully detail research and monitoring plans, particularly with regard to identifying old-growth forests and indicators of ecological integrity.

The ECO supports MNR's plans to develop a partnership with stakeholders (particularly Temagami First Nation) for the maintenance of recreation facilities in the conservation reserves. However, the ECO is concerned with statements in the conservation reserve resource management plan that the delivery of this program will be delegated to the partnership "should the government's financial support for the maintenance program change in the future." Despite any changes in financial support, the ECO believes that MNR must remain accountable for the maintenance of campsites and canoe routes in the conservation reserves.

Review of Posted Decision:

4.22 An Inter-jurisdictional Compliance Protocol For Fish Habitat and Associated Water Quality

Decision Information:

Registry Number: 010-0437
Proposal Posted: May 11, 2007
Decision Posted: September 4, 2007
Comment Period: 45 days
Number of Comments: 4
Decision Implemented: August 28, 2007

Description

In May 2007, MNR posted a proposal notice entitled "An Inter-jurisdictional Compliance Protocol for Fish Habitat and Associated Water Quality," (the "2007 Compliance Protocol"). This protocol provides direction for federal, provincial and municipal agencies with "enforcement and compliance interests in the protection of fish habitat and water quality." Its purpose is to clarify interagency actions in seeking compliance with fish habitat legislation. The agencies bound by the protocol include: the federal departments of Fisheries and Oceans (DFO), Environment Canada (DOE), Parks Canada and Transport Canada; the Ontario ministries of Natural Resources (MNR), Environment (MOE), and Agriculture, Food and Rural Affairs (OMAFRA); and Ontario conservation authorities (CAs). The protocol, which was released in 2007, replaces a 2004 interim version. It contains the same basic instructions, updated to include legislative changes and additional references.

The federal *Fisheries Act* (*FA*) is the only statute with a primary goal of protecting fish and fish habitat, and it contains some very strong provisions. Protection is provided mainly through two sections of the Act. Section 35(1) prohibits activities that cause harmful alteration, disruption or destruction of fish habitat (HADD) unless authorized by the minister. HADD's are authorized only when mitigation measures demonstrate "no net loss" of productive capacity of fish habitat. Section 36(3) prohibits the deposition of deleterious substances into water frequented by fish. For prosecutions under this section, it is sufficient to demonstrate potential to cause harm to fish. The 2007 Compliance Protocol assigned DFO the lead role in enforcement of section 35(1) and for section 36(3) where the substance is sediment. DOE has lead responsibility for enforcement of section 36(3) where the substance is chemical in nature. MNR and MOE are required to play supporting roles, MNR in cases involving habitat destruction and pollution from sediment, and MOE in cases involving chemical pollution. The protocol defines the obligation of these two ministries as dependent on "available resources and capacity."

The 2007 Compliance Protocol sets out the roles and responsibilities for each of the primary agencies in the context of relevant sections of their legislation. Table 1 offers a summary of these relationships. The courts have discretion to impose penalties that range widely, from $400 for dredging or filling in a historic canal without a permit, to $10 million per day for the discharge of pesticides by a corporation with a previous conviction. To date, one of the highest fines ever imposed by an Ontario court was $300,000, in 2005. This was as a result of an MOE prosecution of Imperial Oil in Sarnia for depositing ketones into the St. Clair River, an action that contravened section 36(3) of the *FA*.

To assist agencies in their response, the 2007 Compliance Protocol offers "first-on-the-scene" decision matrices that provide step-by-step instruction from the point a complaint or occurrence is known to the compliance decision. The guides are supplied at two levels, one for district and the other for local staff. The district level matrix instructs the "receiving agency," that is, the agency first aware of the potential contravention through a call or site observation, to fill out an "occurrence report." A sample of this report appends the protocol. The receiving agency identifies the primary contact from a list in the protocol and provides it with a copy of the report. Alternative agencies are also offered in case the primary one is unable to respond. The responding agency determines the appropriate legislation and circulates the report to corresponding agencies. All protocol agencies are responsible for collecting and circulating first-on-the-scene information, whether it pertains to federal or provincial legislation.

Supervisors determine the course of action and if necessary, call on the assistance of district managers or their equivalent. The responding agency is responsible for implementing the compliance requirements and informing the receiving agency of compliance progress. DFO and DOE lead prosecutions and are required to seek approval from the Department of Justice prior to proceeding with enforcement action. MNR and MOE staff may be called upon to provide direct testimony as witnesses in court cases. DFO and DOE also manage all public inquiries and complaints.

The local decision matrix provides additional detail. It instructs the receiving agency to collect site data immediately if the receiving agent has inspection powers and the occurrence is "significant and ongoing"; or if the occurrence is on public property. Otherwise, site data is collected after filling out an occurrence report and contacting a responding agency. The course of action, determined through "timely" discussion between the various related agencies, may involve enforcement action (prosecution/warning), voluntary compliance or an order. The 2007 Compliance Protocol indicates that staffs from appropriate departments and agencies confer regularly on "locally important occurrences, issues and projects."

Recognizing that activities that are destructive to fish habitat may contravene several provincial and federal laws, the 2007 Compliance Protocol recommends that enforcement staff select either simultaneous prosecution or the "most appropriate legislation." In choosing legislation, the protocol recommends considering the purpose of the statute, and the remedies, repairs and penalties available. The local decision matrix adds: evidence for the violation; fish habitat implications; local issues (i.e., deterrent, complaints, etc.); staff capacity and resources; precedence, and previous charges and/or violations, to the list of considerations for determining a course of action.

The 2007 Compliance Protocol includes a section on the ECO and the Commissioner of the Environment and Sustainable Development (CESD), and on the opportunities available for the public to register complaints through the CESD. The appendices contain additional references, including the aforementioned occurrence reporting form, a definitions list, contact information, related legislative powers, a "First-on-the-scene" brochure to guide non-compliance staff in data collection, and "Working around Water" fact sheets and primers.

Table 1: Summary of Agency Responsibilities under the 2007 Compliance Protocol

Primary Agency	Legislation	Compliance Responsibility
Fisheries & Oceans Canada	*Fisheries Act*	Prevent HADDs, sedimentation and activities that hinder fish passage (section 35(1))
	Species at Risk Act	Prohibit actions that harm species at risk, their residence or their habitat.
Transport Canada	*Navigable Waters Protection Act*	Require approval of Minister to construct or place work in navigable waters, to protect public right to such waters.
Environment Canada	*Fisheries Act*	Prohibit deposition of chemical deleterious substance (section 36(3)).
Parks Canada	*Canada National Parks Act*	Prohibit pollution or diversion of watercourses.
	Transport Act	Prohibit dumping and dredging in historic canals and protect their cultural resources.
	Fisheries Act	Prevent HADDs and deposition of deleterious substances in National Parks.
Ontario Ministry of Natural Resources	*Lakes and Rivers Improvement Act*	Require approval for dam construction and alteration and for depositing substances into lakes or rivers.
	Public Lands Act	Require approval for work or deposition of material on public land.
	Aggregate Resources Act	Regulate operation of underwater aggregate operations.
	Crown Forest Sustainability Act	Require Crown forest operations to meet set standards for protecting fish habitat (silt and debris).
Ontario Ministry of Environment	*Ontario Water Resources Act*	Prohibit discharge of material that may impair water quality and require permit for certain large water takings.
	Environmental Protection Act	Prohibit discharge of contaminant likely to cause adverse effect.
	Nutrient Management Act	Management of nutrients applied to agricultural lands (administered with OMAFRA).
	Pesticide Act	Prohibit excess discharge of pesticide.
Ontario Ministry of Agriculture, Food and Rural Affairs	*Drainage Act*	Prohibit the damage to or obstruction of municipal drains.
Conservation Authorities	*Conservation Authorities Act*	Restrict alteration of watercourses, wetlands, floodplains and valleys.

Implications of the Decision

The 2007 Compliance Protocol is an improvement on the 2004 – Interim Measures, offering users additional detail and references as well as legislative updates, to assist agencies in its implementation. Additions include: the *Species at Risk Act* and *Pesticides Act*; Transport Canada, as the agency responsible for the *Navigable Waters Protection Act* after it was transferred from DFO; the local level decision matrix, as well as the legislative powers, occurrence report and first-on-the-scene brochure appendices.

Placing one agency in charge of compliance for the numerous pieces of legislation protecting fish habitat could have many positive implications. Improved clarity, consistency, integration, simplification, communication, efficiency are all hoped-for outcomes of the 2007 Compliance Protocol. In theory, if DFO is adequately resourced, the protocol could work in the manner intended. However, the loss of local expertise at MNR is a concern and there may be a loss of valuable features offered by legislation not deemed "most appropriate." Despite the mechanism for resolving discrepancies, the multiple pieces of legislation will likely continue to complicate compliance and enforcement activities. Ultimately, the effectiveness of the protocol will depend on how DFO implements it and the degree of support from other agencies.

A more predictable ramification of assigning DFO and DOE lead positions is that as federal agencies, contraventions of the *FA* are no longer subject to applications for investigations under the *EBR*. In practice, the ECO stopped forwarding investigations of alleged *FA* contraventions to MNR and MOE in 2004. Since then, potential applicants have been directed to contact the CESD which accepts petitions related to *FA* enforcement and compliance.

The implications of the 2007 Compliance Protocol to fish and fish habitat protection are also limited by its focus, which is on response to occurrences and complaints, not project review and approval.

Public Participation & *EBR* Process

MNR posted the proposal for "An Inter-jurisdictional Compliance Protocol for Fish Habitat and Associated Water Quality" but did not post "2004 – Interim Measures" despite encouragement from the ECO to do so, on the grounds that it was an interim version. While active, the 2004 protocol was widely distributed and was used to train many staff. When the revised 2007 version was first posted on May 11, 2007, MNR did not include a direct link to the protocol. The ministry quickly reposted the proposal with the link on May 17, 2007 after the ECO and other stakeholders informed it of the shortcoming. MNR allowed for a comment period of 45 days instead of the 30 required by the *EBR*.

Four responses were received during the comment period. One respondent was concerned that the 2007 Compliance Protocol may prevent individuals from filing investigations of *FA* contraventions under the *EBR*. The other comments addressed the lack of project review and approval, and of general municipal guidance (regarding official plans, zoning bylaws and development approval processes), factors beyond the scope of the protocol.

SEV

MNR submitted an SEV consideration briefing note with the seven questions it addressed in deciding whether to approve the 2007 Compliance Protocol. MNR reiterated its goals, objectives, sustainable development policy principles, benefits and outcome from its SEV as having been considered, though not all were directly related to the protocol. Among the policy principles for its goal of sustainable development is taking "a holistic, ecosystem approach" and "Human activity that affects one part of the natural world should never be considered in isolation from its effects on others."

In regards to anticipated consequences to the environment, society and the economy, MNR stated that the 2007 Compliance Protocol will have positive effects in all areas. Environmental benefits will be derived from the protection of fish habitat and associated water quality; social benefits from the increased angling opportunities available through this protection, and economic benefits from the enhanced efficiency generated by clarification of roles and responsibilities. MNR included all purposes of the *EBR* in its list of specific purposes served by the protocol. MNR stated that the Canada-Ontario Fisheries Advisory Board (CONFAB) will monitor the implementation of the protocol and that it will be updated regularly to incorporate changes in "legislation, policy or structures."

Other Information

Background:
The history of *FA* enforcement is very convoluted, with involved agencies struggling to cope through periods of decimated staffing and fluctuating political priorities. In 1975, the provincial government agreed to assume partial responsibility for enforcement of certain parts of the *FA* and MOE and MNR began to prosecute under the *FA* provisions prohibiting deposits of deleterious substances (now section 36(3) of the *FA*). In 1989, MNR took over as lead enforcer for section 35(1) of the *FA*. This was the same year

that MNR and DFO, through the "Memorandum of Intent on the Management of Fish Habitat," agreed to implement DFO's "Policy for the Management of Fish Habitat," a policy that established "no net loss of the productive capacity of habitats" as the guiding principle for achieving DFO's habitat conservation goal.

In 1997, MNR faced cutbacks and having received no federal funding to support its compliance and enforcement role under the *FA*, it returned lead for enforcement of section 35(1) to DFO. Until this time, DFO had a limited role in day-to-day fish habitat enforcement. In order to meet its new responsibilities, in 1998 DFO increased its Ontario staff from three or four biologists to about 75; and its fisheries officers from about seven to 25. Habitat biologists assess referrals of potential HADDs and determine mitigation measures required to protect fish and fish habitat, while fisheries officers respond to occurrence reports and take enforcement action. DFO also began to enter into agreements whereby conservation authorities, such as Toronto and Region Conservation Authority (TRCA), would assist its staff on *FA* compliance and enforcement work for section 35(1) (see our 1998 Annual Report, page 263).

Although MNR relinquished its role for enforcement of section 35(1), MOE and MNR continued to maintain a compliance and enforcement role for section 36(3) of the *FA*. In practice, MNR was responsible for ensuring that deleterious levels of sediment were not discharged by logging and aggregate companies, among others. Meanwhile, MOE remained the lead on enforcement when incidents arose involving chemical pollution discharges.

In 1998, DFO, Parks Canada, MNR and CAs formed the Fish Habitat Advisory Group (FHAG) to "achieve an effective and efficient aquatic resource management program in Ontario" by streamlining efforts. The group provided a forum for resolving fish habitat management issues and communicating recommendations to participating agencies. It reported to a fisheries steering committee and indirectly to CONFAB. The following year, FHAG developed a document entitled, "Fish Habitat in Ontario: Compliance Protocol – Federal and Provincial Roles and Responsibilities." Ratified in 2000, the protocol transferred lead enforcement for section 36(3) related to chemical substances to DOE for federal lands and federally regulated industries and to MOE for other cases. MNR held onto its lead role for sediment deposition.

The 2000 protocol contained enough ambiguity to cause confusion over whether MOE's responsibility involved enforcement or just investigation and therefore, whether Ontario residents could continue to submit *EBR* applications alleging *FA* contraventions (see our 2001-2002 Annual Report, pages 57-63). In 2002, FHAG established a Compliance Working Group (CWG) charged with revising the 2000 protocol. The result was the "Fish Habitat Compliance Protocol – 2004 Interim Measures." This protocol clarified agency activities, but also introduced a marked change in responsibility. MNR and MOE were given supporting roles for the enforcement of section 35(1) and section 36(3) and DFO and DOE the lead roles, relationships that continued into the final 2007 Compliance Protocol. The revision did not resolve all issues, however. Though DOE's role as lead in prosecution of chemical discharges was clearly stated, it did not stop MOE from launching its own prosecution against Imperial Oil in 2005 (page 73, of our 2004-2005 Annual Report).

Another 2002 initiative of FHAG was a multi-agency website (www.fish-habitat.com) that tracked FHAG activities and protocol investigations. As of April 2008, the website is a password-protected, accessible to members only site that is "currently under construction." In 2005, FHAG adopted a more integrated approach by evolving into the Aquatic Resource Management Advisory Group (ARM), a collective with a membership that extended beyond DFO, Parks Canada, MNR and CAs to include EC, Agriculture and Agri-Food Canada, Transport Canada, MOE, OMAFRA, MTO and Ministry of Municipal Affairs and Housing. A prime objective of ARM is to "identify links to other initiatives and structures that may impact fish habitat and related aquatic resource management directions" and to "facilitate partnerships relating to integrated water resource management." Unlike FHAG, ARM reports directly to CONFAB through recommendations to the Canada-Ontario Fisheries Advisory Group. The website has been updated to display "ARM" as the new owner.

The federal government also began to develop new policies about compliance based on the concept of "Smart Regulation," an initiative announced during the Speech from the Throne in September 2002. This initiative was an attempt to streamline the regulatory process in order to improve Canada's position in the global market. In support of this strategy, DFO released its Environmental Process Modernization Plan (EPMP) in 2004. The EPMP improves efficiency primarily through a risk management framework that concentrates efforts on projects with the greatest risk to fish habitat, conserving resources for "other activities like monitoring and watershed planning." Smart Regulation, and the EPMP shaped the 2007 Compliance Protocol. MNR is also altering its approach. According to its website, the ministry is starting to develop "a formalized risk-based approach to compliance." Another initiative MNR has in the works is the conversion of fisheries management to a landscape-based approach.

Over the years, changing roles and responsibilities have complicated *FA* enforcement and led to uncertainty over which legislation to apply in different cases (see our 2001-2002 Annual Report, pages 57-63; and 2004-2005 Annual Report, pages 70-73). Past applications for investigation under the *EBR* describe compliance issues that have resulted from discrepancies between the *FA*, the *EPA* and the *OWRA*. For example, investigations of an alleged *FA* contravention were denied by MNR in 2000 and by MOE in 2001 based on an absence of "adverse effects," a test set out under the *EPA*, not the *FA*. In 1997, MNR used MOE's *Ontario Water Resources Act* (*OWRA*) criteria in deciding whether to conduct an investigation, standards that were less stringent than the *FA*. Section 30(1) of the *OWRA* prohibits the discharge of any material that may impair water quality, but to obtain a conviction the ministry needed to demonstrate some likelihood of impairment or toxicity. Discrepancies diminished in 2005, when the *OWRA* was strengthened and brought more in line with the *FA* with the enactment of Bill 133, the *Environmental Enforcement Statute Law Amendment Act*. This bill transferred the onus from the ministry's need to show a capacity to impair, to the perpetrator to prove that the discharged material did not impair water quality (see more in our 2005-2006 Annual Report, pages 102-107).

The potential for loss of distinct legislative features when assigning a lead agency to enforce the *FA* was a concern raised by applicants of the joint application for investigation "Alleged Contraventions through Road Construction by Township of Muskoka Lakes" in section 6.2.1 of this Supplement. The application provides an example of how the 2004 protocol was applied. The applicants alleged contraventions of provincial statutes as well as the *FA*, rendering it a valid application under the *EBR*. Ministry actions suggest that the protocol worked well as a communication framework. MNR and MOE responded when notified of a sedimentation event and DFO was contacted when the potential for a HADD was confirmed.

One problem identified by the ECO is that some of the judgements made by the various agencies did not ensure that fish habitat was safeguarded. Protocol agencies did not demand maintenance of simple mitigation measures, which may be attributed to the position of DFO as lead agency. DFO appears to have had a significant influence on the decision of whether the activity constituted a HADD and whether due diligence was observed. The minimal response may reflect DFO's efforts to comply with the federal government's "Smart Regulation" strategy, though MNR is adopting a similar approach.

The Muskoka Lakes application demonstrated the potential effect of the protocol on enforcement of the *FA* and protection of fish and fish habitat, and alluded to the greater implications of project review and approval. The process of project review and approval is described in more detail in under the decision review for the "MTO/DFO/MNR Protocol for Protecting Fish and Fish Habitat on Provincial Transportation Undertakings" in section 4.24 in this Supplement. The MTO protocol, first posted on the Registry in 2006, includes project review and approval.

MOE's response to another complaint in 2007 suggests that the ministry may not have the expertise to fully address its protocol role. The complaint concerned a large chemical spill that entered a Greater Toronto Area watercourse known to support the most diverse fish community in the watershed. Among the fish in this community was a provincially threatened species. MOE responded promptly and evaluated the spill's impact, but its assessment was much different from the assessment made by a fisheries specialist from the local CA, who visited the site the following day. MOE reported the death of numerous minnows, while the specialist recorded thousands of dead fish, including the provincially threatened one and many non-minnow species.

In 2005, DFO informed its staff of a possible reduction of up to 45 biologists and enforcement officers in Ontario by the year 2007. The ECO learned through correspondence with MNR that, "MNR was concerned about DFO's ability to deliver on its part of the Compliance Protocol, and raised this issue to DFO at the fall 2005 meeting of the Canada-Ontario Fisheries Advisory Board. DFO indicated that they would be able to meet their commitments of the Protocol, and thus it was decided to move forward with releasing the 2007 Compliance Protocol."

By the end of 2007, DFO staff was reduced from 75 to 52 biologists and from 25 to nine fisheries officers, but DFO maintained its lead role under the 2007 Compliance Protocol. DFO's website offers annual report statistics on its regulatory activities associated with the administration and enforcement of the fish habitat protection provisions of the *FA*. Table 2, a summary of these statistics, indicates a general decline in activities between 2004 and 2007.

Table 2: Regulatory Activities under the Fish Habitat Protection Provisions of the *Fisheries Act* for Central and Arctic Region and where available, Ontario - Great Lakes Area

Fiscal Year	Review of Development Proposals				Compliance and Enforcement (All Regional)		
	Habitat Referrals		Advice/ Authorizations		Warnings	Charges Laid	Convictions (s. 35,36,38)
	Region	Area	Region	Area			
01-02	4,436	---	3311/330	---	52	9	0
02-03	5913	4405	4387/388	1560/226	114	32	4 (4,---,---)
03-04	6141	4024	4747/515	1724/332	110	15	19(16,2,1)
04-05	4643	4049	3366/481	1459/290	41	23	13(10,2,1)
05-06	4395	3581	3121/440	1275/282	15	9	9(7,2,---)
06-07	3445	1358	2528/304	1025/155	12	6	0

ECO Comment

Enforcement of fish habitat legislation is a complex process because of the number of agencies involved and this has compromised past performance. Articles in our Annual Reports and those of the federal Commissioner for Environment and Sustainable Development describe deficiencies in the protection of fish habitat and waters inhabited by fish and have called for more consistent enforcement and clearer roles in the compliance process for HADD. The ECO commends protocol agencies for updating its guide and trying to fill gaps and reduce confusion.

The 2007 Compliance Protocol offers logical considerations for identifying "the most appropriate legislation," which will hopefully allow staff to apply the most effective law in each case to protect fish habitat. The decision is ultimately a subjective one, however. The ECO encourages provincial ministries to ensure that current, local data forms the basis for the "fish habitat implications" consideration and that budget issues (see our 2007 Special Report, "Doing Less with Less") do not make "staff capacity and resources" the most influential factor.

The increasing application of risk assessment concerns the ECO. Directing less attention to low-risk projects in favour of those of higher risk can be an effective strategy, if executed properly. The ECO urges MNR and MOE to promote the use of landscape-scale plans in assessing risk so that broad-based ecosystem functions and potential cumulative impacts are taken into account. This would be consistent with MNR's SEV and its new approach to fisheries management. With recent DFO staff cutbacks, a reliable foundation for decision-making becomes even more critical.

DFO demonstrated a strong initial commitment in 1998 by increasing its staff by about 100 to address its new responsibilities, an action that now contrasts alarmingly with the 2005-2007 cutbacks. Adequate staff capacity and science-based decision-making are important prerequisites of an effective protocol. Without them, the 2007 Compliance Protocol is merely a political tool giving the illusion that fish and fish habitat are protected.

Nine fisheries officers are not enough to fulfil DFO's enforcement obligations in Ontario. The province will experience a growing loss of fish and fish habitat as a result of these cutbacks. The ECO strongly advises MNR and MOE to modify the 2007 Compliance Protocol agreement so that their responsibilities to protect fish and fish habitat for Ontarians are met. This may require changes to the 2007 Compliance Protocol and MNR may have to re-assume the lead role in enforcing section 35(1) of the *FA* by signing a new agreement with DFO. The ECO will continue to monitor protocol investigations and their implications. The ECO is pleased that FHAG developed a website that tracks protocol investigations, but it should be made accessible to the public, particularly given the clear and ongoing concerns with resources.

One of the most significant changes in the past five years is that Ontario residents can no longer file applications for investigation regarding alleged contraventions of the *FA*. To its credit, MOE stepped into the breach when it passed amendments to the *OWRA* in June 2005 that strengthened section 30(1) and this should allow residents to take stronger actions under the *EBR* to protect water quality. Still, the public's inability to use the *EBR* to request investigations of alleged contraventions of the *FA* and potentially launch lawsuits using section 84 of the *EBR* (Harm to a Public Resource) are major losses of environmental rights. The ECO urges MOE to ensure it develops policies on enforcement of section 30(1) of the *OWRA* that will partially address this gap.

Review of Posted Decision:

4.23 Ministry of Transportation Environmental Standards Project

Decision Information:

Environmental Reference for Highway Design
Registry Number: PE05E4553
Proposal Posted: July 7, 2005
Decision Posted: November 29, 2007
Comment Period: 45 days
Number of Comments: 2
Decision Implemented: April 5, 2007

Wildlife and Transportation Reference Document for the Oak Ridges Moraine
Registry Number: PE05E4554
Proposal Posted: July 7, 2005
Decision Posted: November 29, 2007
Comment Period: 45 days
Number of Comments: 0
Decision Implemented: April 5, 2007

Environmental Guide for Patrol Yard Design
Registry Number: PE05E4557
Proposal Posted: November 10, 2005
Decision Posted: November 29, 2007
Comment Period: 45 days
Number of Comments: 0
Decision Implemented: April 5, 2007

Environmental Guide for Contaminated Property Identification and Management
Registry Number: PE06E4558
Proposal Posted: May 2, 2006
Decision Posted: November 29, 2007
Comment Period: 45 days
Number of Comments: 0
Decision Implemented: April 5, 2007

Environmental Guide for Erosion and Sediment Control During Construction of Highway Projects
Registry Number: PE06E4559
Proposal Posted: May 2, 2006
Decision Posted: November 29, 2007
Comment Period: 45 days
Number or Comments: 0
Decision Implemented: April 5, 2007

Description

In November 2007, the Ministry of Transportation (MTO) posted seven decision notices on the Environmental Registry that all fall under the umbrella of MTO's ongoing Environmental Standards Project. The posted decisions were:

- Environmental Reference for Highway Design;
- Wildlife and Transportation Reference Document for the Oak Ridges Moraine;
- Environmental Guide for Patrol Yard Design;
- Environmental Guide for Contaminated Property Identification and Management;
- Environmental Guide for Erosion and Sediment Control During Construction of Highway Projects;
- Environmental Guide for Fish and Fish Habitat; and
- MTO/DFO/MNR Fisheries Protocol for Protecting Fish and Fish Habitat on Provincial Transportation Undertakings

The Environmental Guide for Fish and Fish Habitat and the MTO/DFO/MNR Fisheries Protocol are discussed separately in section 4.24 of this Supplement.

The decision for all five documents was to adopt them as they were originally proposed because, according to MTO, they had all received substantial review and comment from internal stakeholders as well as federal and provincial stakeholders prior to posting. The versions that were posted as decisions on the Registry were dated May 2005, although the versions of the documents that are now available on the MTO website are updated versions dated October 2006.

MTO oversees over 16,000 kilometres of highway including the 400-series highways, arterial and collector roads, and any other roads not administered by municipalities. MTO plans to spend an annual capital budget of $1.12 billion during the 2007/2008 fiscal year. This will cover everything from the construction of new highways, road widening projects, and drainage improvements to new lighting and road resurfacing. Road construction has a number of environmental impacts which include among other things: altering stream drainage patterns; sediment deposition to surface waters; damage to wetlands, wildlife and fish habitat; disruption or blockage of wildlife migration corridors; and fragmentation of ecosystems.

In the past, the environmental standards that were used by MTO were not compiled or centrally located so MTO initiated the Environmental Standards Project. The ECO reviewed the initial decisions under this project in the 2004-2005 Annual Report. The intent has been to pull all of the information together into one place and make it comprehensive as well as updating any of the out of date information. The Environmental Standards Project is organized hierarchically; the top being the compilation of all of the regulations and legislation that applies to MTO transportation projects down to the technical guide level. MTO considers the package a living document that needs to be updated as new information becomes available. These decision notices include both high-level, overview documents as well as on-the-ground technical guides.

Environmental Reference for Highway Design:
The purpose of this reference document is to provide guidance to consultants in addressing the environmental assessment requirements during the preliminary planning and detail design phase of transportation projects. It is intended to provide consultants with information on the legislative obligations, technical quality, and program delivery expectations of MTO. It outlines the scope of work and staff qualifications, as well as specific timing and documentation requirements to be conducted for each environmental specialty area, and references sources of information that can be used in the design of environmental mitigation measures. The document is comprised of several sections each dealing with different environmental aspects of highway design. Each of the sections provides the requirements for identification and assessment of the environmental component, management, development of technical reports, and qualifications.

Wildlife and Transportation Reference Document for the Oak Ridges Moraine:
This reference document is intended to provide suggestions to help address the Environmental Protection Requirements for the Oak Ridges Moraine, specifically those related to facilitating wildlife movement and maintaining ecological integrity. This document is not intended to apply across the whole of the province and is considered a literature review rather than a "how to" manual by MTO. The document discusses the sources of information that can be researched to try and determine where animals might cross the road. Once gathered, this information is intended to assist with determining where roads might be avoided or where there might be wildlife conflict zones on the new road in order to plan wildlife crossings for these areas. The document also provides suggestions on highway design mitigation measures which includes influencing motorist behaviour and modifying wildlife behaviour. The document contains information on the types of wildlife crossings that have been used in other road projects, and the type of crossing to use depending on the target species. Habitat creation considerations are also explored as well as information on impacts on and encounters with wildlife during construction, operation and maintenance of the highway and the structures and ditches associated with the highway. Information on monitoring techniques and their effectiveness is also included with an emphasis on the importance of monitoring use by wildlife because little is known about the effectiveness of the various designs of wildlife crossings. The appendices focus on road ecology, a review of the various designs used for amphibian tunnels, and the construction of artificial sites specific to Massasauga Rattlesnakes. The Developing Issues part of the ECO's 2007-2008 Annual Report provides an overview of road ecology issues.

Environmental Guide for Patrol Yard Design:
This guide intended to outline the typical potential environmental concerns to be considered during the design of a new patrol yard (the areas where MTO stores and maintains their equipment as well as salt and sand storage). The guide groups the environmental impacts of patrol yards into the following categories: the footprint, the construction and the operational activities that occur within the patrol yard. The guide makes reference to the other guidance documents that pertain to patrol yards. The main content of the guide is the environmental design considerations including avoiding impacts by choosing an appropriate site for the patrol yard.

Environmental Guide for Contaminated Property Identification and Management:
This guide is intended to assess environmental site conditions and liabilities and identify options for mitigation on contaminated sites that MTO owns. The guide is to be used either when MTO is acquiring a contaminated property or when a property is being disposed of. It is also to be used for on-going property management where the objective is the mitigation/remediation of sites on a priority and risk management basis, and as financial resources become available.

Environmental Guide for Erosion and Sediment Control During Construction of Highway Projects:
This guide is intended to provide information to strengthen the management of highway projects by implementing a modern erosion and sediment control management approach; consider the use of alternative and cost effective erosion and sediment control techniques; facilitate easy access to and consistent application of erosion and sediment control techniques and drainage management practices across all MTO regions of the province; allow development of effective erosion and sediment control through a variety of delivery methods; ensure that MTO regulatory concerns are addressed in a consistent and comprehensive manner; and address issues that are sources of potential liabilities to MTO as a result of the erosion of earth surfaces or sedimentation.

Implications of the Decision

These are the key environmental reference documents and guides that MTO staff and MTO's consultants will use for all transportation projects. MTO has stated that these are the environmental standards that should be followed and they are referenced in the legal documents that are signed when a contract is awarded. These documents and guides are integrated with MTO's Class Environmental Assessment (EA) for Provincial Transportation Facilities. The documents summarize existing legislated requirements, and do not set requirements beyond what is legislated. The documents do not provide best management practices.

The intent is that the documents and guides are not optional and that they are to be used in all MTO projects. When consultants are hired to work on an MTO project, they have to look at the guidelines and determine which ones are applicable to the project.

The documents and guides do not prioritize environmental values (such as protection of wetlands) nor do they weigh these values against socio-economic or other factors. That prioritization occurs during the integrated EA process. MTO relies on stakeholders such as MNR, MOE and conservation authorities to bring environmental issues forward and to provide the information on where natural heritage features such as wetlands and woodlands exist. They also rely on stakeholders to bring forward issues such as landscape connectivity and cumulative impacts, since these are not covered in existing legislative requirements.

To help monitor the effectiveness of the environmental standards project, MTO is developing an environmental management system. It has not yet been implemented. It will not be testing on- the-ground effectiveness but rather will monitor how well the guides are followed and implemented and kept up to date.

The new references and guides do not change how MTO staff, contractors and others apply or interpret MTO's Class EA process. Under the MTO's Class EA, the public and stakeholders provide comments throughout the various phases of the project. The new guides do not change how a route is selected or where highways will be built or expanded in the future.

Public Participation & *EBR* Process

Each of the proposal notices was posted for 45 days. Four of the documents did not attract any comments. Two comments were received on the Environmental Reference for Highway Design. Both of the comments mentioned that the summer is not an ideal time to post proposals because many people take vacation during that time. One commenter also noted that 45 days was not enough time given the number of proposal notices and the length of the documents. The ministry responded that these comments had no effect on the document because there are no restrictions on when a decision can be posted and that 45 days was adequate given that 30 days is the mandatory minimum.

One commenter provided comments on a document upon which the comment period was already closed. This confusion was caused by the fact that a link from the Registry proposal notice to MTO's website provided access to many documents, several of which were part of the seven decision notices.

One commenter noted that sections of the document were missing and requested copies of those sections. The same commenter questioned whether the document would apply to transportation projects that had already been initiated. The commenter also raised the issue of compliance with the standards and who would ensure that on-site requirements are met. The ministry deemed the comments not to be substantive and had no effect on the document. It is not clear as to whether the commenter received an adequate response.

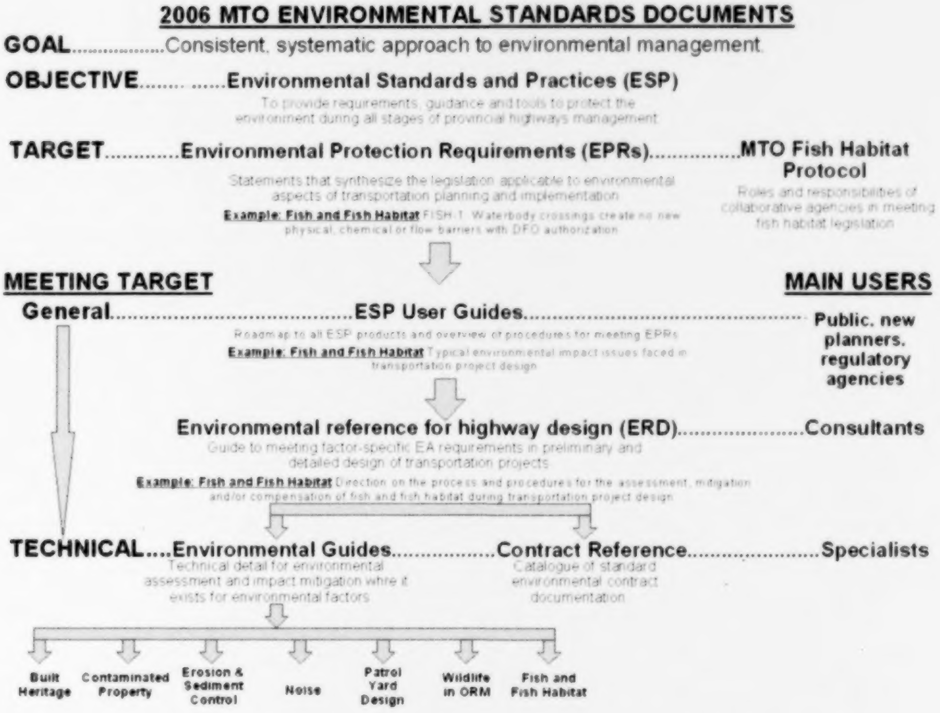
SEV

The SEV Considerations for all five documents were virtually the same: The Natural Environment; Environmental Concerns in Decision-Making; Integrated Transportation Planning; Public Participation; Education and Promotion; and Greening.

The "Consideration of SEV" statement submitted by MTO states that consultants working on behalf of MTO will now have access to current information. The reference document provides better information on which to base environmental mitigation and design decisions, so that the commitments made to protect the environment in the environmental assessment process are better supported during construction. It is proposed that training programs will be developed to raise the awareness of ministry staff and partners, of all the products of the Environmental Standards Project on both a general and project-specific level.

Other Information

To better understand how the reference documents and guides work together, the ECO developed the following flowchart:


2006 MTO ENVIRONMENTAL STANDARDS DOCUMENTS
GOAL.................Consistent, systematic approach to environmental management
OBJECTIVE....... ......Environmental Standards and Practices (ESP)
To provide requirements, guidance and tools to protect the environment during all stages of provincial highways management
TARGET............Environmental Protection Requirements (EPRs)...............MTO Fish Habitat Protocol
Statements that synthesize the legislation applicable to environmental aspects of transportation planning and implementation
Example: Fish and Fish Habitat FISH-1. Waterbody crossings create no new physical, chemical or flow barriers with DFO authorization
Roles and responsibilities of collaborative agencies in meeting fish habitat legislation
MEETING TARGET
MAIN USERS
General..ESP User Guides... Public, new planners, regulatory agencies
Roadmap to all ESP products and overview of procedures for meeting EPRs
Example: Fish and Fish Habitat Typical environmental impact issues faced in transportation project design
Environmental reference for highway design (ERD).....................Consultants
Guide to meeting factor-specific EA requirements in preliminary and detailed design of transportation projects
Example: Fish and Fish Habitat Direction on the process and procedures for the assessment, mitigation and/or compensation of fish and fish habitat during transportation project design
TECHNICAL....Environmental Guides.................Contract Reference......................Specialists
Technical detail for environmental assessment and impact mitigation whre it exists for environmental factors
Catalogue of standard environmental contract documentation
Built Heritage
Contaminated Property
Erosion & Sediment Control
Noise
Patrol Yard Design
Wildlife in ORM
Fish and Fish Habitat

The flowchart shows the hierarchical organization of the documents and guides as well as the intended users. The decision notices discussed here are mostly at the technical environmental guide level.

ECO Comment

The ECO commends MTO for recognizing the need to centralize all of this information. MTO staff has noted that it is a living process and that the project needs priority and ongoing resources in order to keep it up to date and to maintain the environmental management system. The ECO will follow this project as it progresses.

To date, MTO's work on the Environmental Standards Project has been a confusing process to follow. The various reference documents and guides have been posted at differing times on the Registry with no explanation as to how they fit together. There are 13 documents/guides that fall under the Environmental Standards Project. In February 2008, MTO did post "Environmental Standards and Practices, An Overview for Users" which does help explain how the documents are intended to fit together. This overview is extremely helpful and it would have been useful to post it at the same time as the seven decision notices. MTO also created additional confusion when it provided a link to its website, allowing the public to see more than just the seven pertinent decision notices. The ECO has been advised that in the future, MTO will make sure that just the relevant document(s) are directly linked to Registry postings.

The ECO notes however, that the Environmental Standards Project does not resolve some of the larger problems with the highway planning process, EA process and the actual construction process. The ECO has previously outlined these concerns in the 2004-2005 Annual Report. For example, the ECO noted that the Provincial Policy Statement allows infrastructure, including highways, in provincially significant wetlands. MTO needs to collaborate with other agencies like MNR to identify future road corridors long before municipal planning decisions are made in order to choose locations with the least amount of impact to natural heritage features. MTO staff agrees that this would be appropriate but currently there is no mechanism in the planning process to identify and set aside future road corridors.

While MTO's environmental standards are intended to help at the planning and design stages for new transportation projects, a key concern is how carefully the standards are interpreted and implemented on the ground by hundreds of contracting companies working for MTO. There are contract administrators on site to oversee projects but their role includes much more than checking on environmental factors and compliance. They are also responsible for overseeing most other aspects of the contract. Contract administrators can issue warnings and non-compliance infractions but these are only given in very serious situations (usually Fisheries Act infractions). MTO states that "Warnings of Infraction and Infractions are given for serious violations. Since they are given for serious violations of our contract provisions, the consequences to a contractor can be very severe up to and including restriction from bidding on future ministry work projects." The contract administrators follow the Construction Administration and Inspection Task Manual (CAITM), April 2007, which contains hundreds of items requiring oversight by contract administrators before, during and after construction. MTO states that they have issued infractions to contracts for a number of environmental incidents (other than the Fisheries Act) including such things as dust control, sediment in watercourse, no silt fencing, etc.

Contracts have a definitive end date and once that date is reached, contractors are expected to have provided all the contract requirements in a functioning state. MTO states that it has monitoring, enforcement, sanction and appraisal systems for contractors who do not comply fully with environmental requirements. Nevertheless, the ECO remains concerned that environmental requirements are perceived to be a low priority for contractors, despite the detail laid out in these MTO environmental standards documents and guides. MTO notes that the ministry has issued three environmental infractions to contractors in each of years 2005, 2006 and 2007. Considering the scale of the ministry's contracted work province-wide and its $1.12 billion capital budget, this modest compliance activity is surprising. It may reflect an insufficient level of compliance monitoring.

MTO usually does not carry out environmental compliance monitoring or auditing of its highway projects at the post-construction phase. The intense scheduling and budgetary pressures typical in the highway construction industry make it unrealistic to expect that up-front environmental standards alone will be effective, given limited field monitoring and enforcement and the absence of field auditing. This is an issue that MTO should be addressing corporately, with the active participation of branches such as the ministry's Contract Management and Operations Branch.

As noted in the ECO's 2004-2005 Annual Report, the ECO highlighted the need for adequate environmental training for highway construction teams and administrators. The ECO is pleased to note that there has been extensive training on the "MTO/DFO/MNR Fisheries Protocol for Protecting Fish and Fish Habitat on Provincial Transportation Undertakings" both internally and externally, and that there was training for MTO environmental staff on the documents and guides when they were 'launched' in 2007. However, training on the guides is not compulsory for contractors or consultants, with the exception of the Fisheries Protocol. In March 2006, MTO staff informed the ECO that once the documents were posted, there would be comprehensive training for staff, contractors and consultants.

The ECO is concerned with instances where the Environmental Protection Requirements (EPRs), the document that synthesizes the legislation applicable to MTO projects, uses language such as the phrase "to the extent that is technically, physically and economically practicable." Although this document is not one of the decision notices that is being reviewed here, it is an integral component of the overall environmental standards project as shown in the flowchart above. In the opinion of the ECO, this language inappropriately summarizes the intent of the legislation and seems to provide road planners, designers and contractors loopholes that aren't intended by the legislation that is being summarized. The ECO raised concerns about this same language in the 2004-2005 Annual Report.

These documents and guides only apply once the decision has already been made to build a highway. Although this is an excellent compilation of information, references and guidelines, it does not change the fact that many highways are usually built along the only corridor that is left after the rest of an area has been approved for development. This 'pushes' roads into areas where many of the natural heritage features are located. Although MTO will attempt to avoid these features as a first step, they are constrained by existing development, proposed development, socio-economic considerations, and engineering and safety limitations. Ontario residents often find that the EA process for highways is very frustrating. Development often seems inevitable, and roads and highways are built in natural areas regardless of the impacts that it will have on the environment. The ECO will be monitoring how MTO continues to implement the Environmental Standards Project.

Review of Posted Decision:

4.24 MTO/DFO/MNR Protocol for Protecting Fish and Fish Habitat on Provincial Transportation Undertakings

Decision Information:

Registry Number: PE06E5601
Proposal Posted: February 13, 2006
Decision Posted: November 29, 2007
Comment Period: 30 days
Number of Comments: 1
Decision Implemented: October 31, 2006

Description

In October 2006, the Ministry of Transportation (MTO) implemented a new protocol entitled, "MTO/DFO/MNR Protocol for Protecting Fish and Fish Habitat on Provincial Transportation Undertakings" (the "2006 MTO Protocol") to provide direction for "conservation, protection and restoration of fish habitat" while undertaking provincial transportation projects. The objective of the 2006 MTO Protocol is to increase "certainty, consistency, efficiency and effectiveness" in implementing fish habitat legislation, regulations, policies and programs by working in collaboration with the Department of Fisheries and Oceans (DFO) and the Ministry of Natural Resources (MNR). Member agencies agreed to implement the 2006 MTO Protocol in accordance with DFO's "Policy for the Management of Fish Habitat" (1986) and MTO's Environmental Standards and Practices, and considering the goals, objectives and principles of MNR's "Our Sustainable Future" (2005) and "Strategic Plan for Ontario Fisheries," SPOF II (1992).

This protocol is an update of a version released in 1993 entitled, "Fisheries Protocol: An Agreement between the Ministry of Transportation and the Ministry of Natural Resources for Protecting Fisheries Resources on Provincial Highway Undertakings." The 1993 MTO protocol was written to conform to the policy at the time that gave MNR authority to conduct fish habitat impact reviews for MTO projects on behalf of DFO. This authority was transferred to DFO when the "Fish Habitat Compliance Protocol – 2004 Interim Measures" was released, a protocol to assist federal and provincial agencies with compliance and enforcement responsibilities related to their fish habitat legislation. The 2006 MTO Protocol incorporates this and another significant change; it allows MTO and its service providers to "self-screen" projects for their potential to impact fish and fish habitat. When the 2004 interim compliance protocol was finalized in 2007, (i.e., the "2007 Compliance Protocol") its alterations were minor, demanding no subsequent revision to the 2006 MTO Protocol. (For a review of the 2007 Compliance Protocol decision, see section 4.22 of this Supplement.)

The 2007 Compliance Protocol and the 2006 MTO Protocol are both interagency guides for protecting fish and fish habitat. The former directs agencies with legislative obligations in responding to potential contraventions, while the latter directs agencies on how to prevent contraventions. Like the 2007 Compliance Protocol, the 2006 MTO Protocol describes agency roles and responsibilities and contains important information including: a decision matrix ("MTO Referral Process Flow Chart"), legislative background, notification forms, agency contact list and glossary. The main focus of the 2006 MTO Protocol is on risk assessment, mitigation measures and compensation plans needed to meet legislative requirements.

The 2006 MTO Protocol gives a description of the basic process that proponents and contractors should follow to prevent contraventions of laws protecting fish and fish habitat, but also includes "annexes" on: Emergency Works Procedures and Spills Response; Quality Assurance and Quality Control Program; Terms of Reference for the Implementation Team, as well as a summary of related protocols, guidelines and documents. Finally, the 2006 MTO Protocol was published in an abridged form without the administrative detail, for technical use (i.e., the User Field Guide).

The 2006 MTO Protocol defines emergency work as emergency repair of a highway facility or a situation that presents "imminent risk to life, public safety, damage or loss of property." Emergency work must still comply with laws protecting fish and fish habitat and the protocol outlines the procedure to follow.

Protocol members are required to carry out a "Quality Assurance/Quality Control Program" to ensure "consistent and effective" protocol implementation and to deliver joint training programs for staff and MTO service providers. To date, almost one thousand MTO staff, consultants and contractors have been trained on the 2006 MTO Protocol and guides. This section also includes a description of the required qualifications of fisheries specialists, though the Fisheries Protocol Implementation Team may consider consultants that do not meet the full criteria, on a case-by-case-basis. The section describes two types of annual audits performed jointly by DFO and MTO. One is a self-screening audit of the protocol process, which is a paper/desk review carried out by a "process audit" consultant on five per cent of the total regional projects or two per region, whichever is greater. The other is a post-construction field investigation audit conducted by DFO and MTO staff to ensure that the correct assessment and decision was made and that mitigation measures were implemented as intended. Ten post-construction audits are carried out each year, two per MTO region. Both the self-screened and post-construction audits consider up to five watercourses per project. The audits amount to between five and ten per cent of total projects.

The MTO Fisheries Protocol Implementation Team monitors the effectiveness of the 2006 MTO Protocol. The team may amend the protocol at any time provided that member agencies agree. There is a provision to review the protocol after three years. The team also provides a mechanism for dispute resolution. They meet monthly and provide annual reports on the implementation of the protocol and on activities related to the fish habitat provisions of the *Fisheries Act* (*FA*). The team reports to the Canada-Ontario Fisheries Advisory Board (CONFAB), a board established under the Canada-Ontario Fisheries Agreement (1988) to oversee fisheries management in Ontario.

An important limitation of the 2006 MTO Protocol is that it applies to the administration of only section 35(1) of the *FA*. The *FA* is a federal statute administered by DFO. It is the primary Act protecting fish and fish habitat and the two most important provisions are section 35(1) and section 36(3). Section 35(1) of the Act prohibits activities that cause harmful alteration, disruption or destruction of fish habitat (HADD) unless authorized by the minister. Authorization is supposed to be provided only if proposed mitigation measures will achieve "no net loss" of productive capacity of habitat to produce healthy fish, the guiding principle of DFO's "Policy for the Management of Fish Habitat."

Section 36(3) of the *FA* prohibits the deposition of deleterious substances into water frequented by fish. It is sufficient to demonstrate potential to cause harm to fish for prosecutions under this section. The protocol offers the phone number for the Ministry of the Environment Spills Action Centre to report the release of chemicals and sediment that may contravene section 36(3). MTO describes sediment control procedures at its transportation sites in its "Environmental Guide for Erosion and Sediment Control During Construction of Highway Projects" ("the ESC Guide"). The ESC Guide is one of the many Environmental Standards and Practices (ESP) documents MTO released in 2006 and 2007 (see decision review in section 4). The 2006 MTO Protocol and its field guide are also ESP documents and the protocol is implemented using the other ESP documents. The key support document is the "Environmental Guide for

Fish and Fish Habitat" (the "Fish Guide"). All ESP documents must comply with the process and procedures outlined in the 2006 MTO Protocol.

MTO Referral Process Flow Chart:
The 2006 MTO Protocol offers a flow chart that guides the user through the protocol process, making frequent reference to ESP documents for information. The Fish Guide provides this flow chart in much more detail. The first step in the protocol process is deciding whether there is any fish or fish habitat that will be affected by the project. The protocol permits projects that are 30 metres or more from a waterbody (determined from the ordinary high water mark) to go ahead without notification to MNR or DFO. In defining a waterbody, the Fish Guide notes the importance of including small, seasonal streams. It also explains that they are not mapped and that proper identification requires field investigation. MTO determines proximity to a waterbody independently based on maps.

If MTO decides that there is a watercourse within 30 metres, it notifies MNR, and in some cases DFO, and requests available fisheries data from MNR. Using the data, MTO carries out a preliminary fisheries assessment to identify the degree of risk for a HADD after appropriate mitigation measures are taken. If MTO decides: that a HADD is unlikely with mitigation; that fish and fish habitat sensitivity is low; and that the project extent, duration and intensity are all low, the project is considered low-risk. The Fish Guide's example of a low-risk project is the replacement of a culvert on an intermittent watercourse during the dry period. In this case, MTO completes a "No HADD" Notification Form and sends it to both DFO and MNR "for information only" and if DFO expresses no concerns, MTO proceeds with the project without *FA* authorization.

Alternatively, if MTO decides the risk is moderate to high that the project with mitigation will cause a HADD, or that the risk is unknown, it enlists the aid of a fisheries assessment specialist to carry out a comprehensive fisheries assessment that involves field investigation. Should the comprehensive analysis show that effects remain after mitigation is applied, a risk assessment matrix is used to determine how to reduce the risk from the residual effects. Risk is read from a matrix that plots "fish and fish habitat sensitivity" by "scale of negative effect." Low-risk takes up more than half the matrix, which means that most variations of sensitivity and effect will generate a low-risk assessment. The Fish Guide also requests that uncertainty be plotted on the matrix, as a circle of a size that varies depending on degree of certainty.

Risk assessment may determine that the project is actually low-risk, requiring "no HADD" notification, only. If risk assessment indicates that a HADD is likely, MTO sends a "HADD" Notification Form to DFO. DFO may disagree with the findings and recommend the project proceed without authorization or may deem it an unacceptable HADD and request that MTO provide additional information or pursue further assessment through its fisheries specialist. As an example of an unacceptable HADD, the Fish Guide offers "the installation of a new culvert over Species at Risk (SAR) habitat will be considered a HADD, and may be considered unacceptable by DFO unless all reasonable siting and design alternatives have been precluded."

If DFO decides a HADD is acceptable, MTO prepares a compensation strategy and works with DFO on a draft compensation plan that meets its "no net loss" policy objective. Once authorization is issued, MTO carries out its project, adhering to all required mitigation and/or compensation plans. All flow chart pathways culminate with MTO proceeding with the project.

The Construction Process:
Contract administrators and contractors are responsible for ensuring that the design and mitigation measures are correctly implemented. The contract administrator oversees the contractor. A fisheries contracts specialist, if required, works for either the contract administrator or the contractor. Under the 2006 MTO Protocol, projects with *FA* authorization require a fisheries contracts specialist to conduct construction and post-construction monitoring for up to three years or more depending on the complexity of the project. If conditions of the authorization can't be met, the fisheries contracts specialist will recommend an amendment to the authorization.

Projects without *FA* authorization (i.e., low-risk) do not require monitoring or the services of a fisheries contracts specialist. They also fall under "Approach 1" to erosion and sediment control, one that does not make contractors responsible for "the erosion and sediment caused by their operations." Most MTO provincial transportation projects (90 per cent) are assessed at low-risk. According to standard MTO procedure, such projects will receive construction inspection and monitoring, but by the contract administrator and the contractor, not by a fisheries specialist. MTO may, however, decide to conduct post-construction checks on riparian plantings, slope/soil stabilization and low flow channel stability at these sites. The Fish Guide states that where projects have no *FA* authorization, but, "Where there is in-water work or potential for impacts to fish and fish habitat, MTO may elect to require that the monitoring to be done by a Fisheries Contracts Specialist, or at a minimum, an individual with training in relation to works around water" (sic). MTO maintenance contractors may observe and rectify post-construction environmental problems at the time of contract closure, but their inspection encompasses a lot more than environmental factors.

Construction contractors cover the cost of correcting their work up to the end of the warranty period (typically one year). Warnings and infractions can be issued for non-compliance, but this only happens in very serious situations. There were three environmental infractions each year over the past three years. Contractors with bad records on *FA* compliance can be removed from the bidder's list through the ministry's infraction report process or as a result of a poor performance rating. The ministry can also place a contractor in "default" of contract that, if carried through, would result in the contract being taken away from the contractor. Likewise, a contract administrator that demonstrates poor oversight of a contractor's environmental compliance can be removed from eligibility for future assignments with the ministry.

Implications of the Decision

The 2006 MTO Protocol and supporting ESP documents provide extensive information and direction for protecting fish and fish habitat while carrying out provincial transportation undertakings. Simultaneous production of the ESP documents has ensured they are comprehensive, consistent and interactive. However, as with any documentation that spans broad subject matter, there is the potential to lose the user along the way. The hierarchical structure helps, as does the frequent referral to the purpose of other documents. But despite these efforts, there is still the possibility for confusion, partly due to the sheer volume of information, but also due to areas of repetition. There are fish sections in the User Guide, ERD and ERCP which overlap sections of the Fish Guide.

MTO is determining proximity to a watercourse without field inspection or verification by MNR or DFO; and the available fisheries data MTO uses for self-screening may not include small stream data. This means that small streams will be lost through the construction of MTO projects.

The risk assessment matrix is a reasonable tool for conceptualizing ways to reduce risk, but used as intended, to plot points for attributes measured as low, medium or high; or a circle for degree of uncertainty, the matrix appears to become onerous and subjective.

According to the 2006 MTO Protocol flow chart, all provincial transportation undertakings go ahead. They may require further assessment, redesign, relocation, enhanced mitigation measures and/or compensation in order to generate a "no HADD" or an acceptable HADD but eventually they proceed. The risk assessment matrix is weighted in favour of low-risk. In most cases, the risk is downgraded to low through mitigation.

Having nearly all projects considered low-risk places heavy reliance on properly functioning mitigation measures. Yet low-risk projects do not require fisheries specialists or post-construction monitoring, and contractors are not held responsible for erosion and sedimentation that results from low-risk projects. Audits are conducted on few projects. The implication here is that fish and fish habitat will continue to be lost; and considering the introduction of self-screening, the 2006 MTO Protocol will increase the rate of loss.

Public Participation & *EBR* Process

On February 8, 2006, MNR posted an information notice for "MTO/DFO/MNR Protocol for Protecting Fish and Fish Habitat on Provincial Transportation Undertakings." The information notice included a web-link which MNR stated would access the MTO posting. The link was actually to the home page of the Environmental Registry. MTO did not post the policy proposal until February 13, 2006, and included a postal address for obtaining the draft version instead of a web-link since the document was not yet available on the MTO website. MTO explained that the proposal notice was being re-published to include a link to the document, however as of May 2008, MTO had not updated the notice.

MTO provided a 30-day comment period on the 2006 MTO Protocol. One comment was received, in writing. The commenter did not agree with the use of fisheries consultants for conducting reviews under the *FA* or auditing the work of other fisheries consultants. The commenter considered the situation biased and unethical.

MTO considered the commenter's concerns to be based on misunderstanding. The ministry wrote and met with the commenter, and explained that the protocol demands that fisheries consultants have specific qualifications and complete a three day training course with an exam. MTO further stated that the result of the fisheries assessment would be sent to DFO to ensure its support. The ministry also described two annual audits, one by MTO of random fisheries assessments by a third party "process auditor" to look for compliance with the protocol and opportunities for improvement; and the other, a field audit by MTO and DFO to confirm that project designs were properly implemented. MTO considered the correspondence to have addressed the commenter's concerns and made no document changes.

The decision notice was posted in November 2007, more than one year after it was approved and implemented on October 31, 2006. The document title on the decision notice still stated "Draft." Rather than a direct web-link to the document, MTO provided the web address for the ESP documents on its website. During a meeting with the ECO, MTO made a commitment to provide direct web-links to documents in future notices.

SEV

According to MTO's SEV consideration document, the ministry considered the value of protecting natural habitat "wherever possible and practical," and the importance of integrating the environment into transportation planning and balancing environmental and transportation objectives. MTO accepts a role in educating its partners and the general public on environmental issues and in deriving benefit from the exchange of environmental information. The ministry considers public consultation "critical to sound environmental planning" and will encourage the public to contribute to decisions "that might significantly affect the environment." It will "seek to achieve a planning process that is open to comment by the public, stakeholders and transportation partners."

MTO states that the protocol will ensure the proper identification and protection of fish and fish habitat in provincial transportation projects. The ministry integrates the needs of MTO, DFO and MNR and will integrate the purposes of the *Environmental Bill of Rights (EBR)* into activities and long-term decision-making. Public consultation related to implementing the protocol is provided during MTO's class environmental assessment process. MTO refers to its efforts of ensuring quality through proper training, qualification requirements, annual audits, formal protocol review and the establishment of a tri-agency implementation team.

Other Information

The 2006 MTO Protocol is an example of "Smart Regulation," a federal government strategy announced in 2002 that seeks to streamline the regulatory process. This strategy is described in the decision review of the 2007 Compliance Protocol in section 4.22 of this Supplement.

The ECO 2004-2005 Annual Report reviews an audit carried out in response to a 2003 application for investigation related to flooding caused by MTO's expansion of Highway 400 in the Muskoka district. The audit revealed that highway contractors ignored rules for the location of waste sites, neglected to install silt fences or used them incorrectly, failed to install riprap (rocks used for erosion control), failed to vegetate designated sites properly, and allowed water to back up onto private property, killing trees and damaging private property. The audit reported a lack of knowledge by all staff of the contractor and contract administrator. It also reported that environmental inspectors didn't understand the environmental conditions and that a variety of environmental requirements were overlooked. The audit recommended strengthening contract documents, building in penalties and providing training for all staff involved, including designers, contractors, contract administrators and environmental inspectors. It also recommended monthly inspection visits by MOE, MNR and DFO.

In another article in the same Annual Report, the ECO expressed concern that provincial highway routes take the path of least resistance from a policy standpoint – typically natural heritage land – and that this leads to a pattern of connecting the "green dots" on the landscape. This type of planning is not consistent with MNR's "Strategic Plan for Ontario Fisheries" (SPOF II) or its policy entitled, "Our Sustainable Future." The goal of SPOF II is ensuring Ontarians have healthy aquatic ecosystems that provide sustainable benefits. To achieve this goal, SPOF II recommends applying an ecosystem approach to ensure that land and water-based activities are addressed in assessing the health of aquatic ecosystems. MNR has experienced difficulties in implementing SPOF II and among the reasons cited for this were poor economic climate and MNR's decreasing role in fish habitat management. "Our Sustainable Future" includes related ideals in its guiding principles: management of natural resources with an ecosystem approach; a sound understanding of natural and ecological systems; exercising caution in the face of uncertainty, and anticipating and preventing negative environmental impacts before taking on new activities."

In 2005, DFO announced that it would be cutting staff over the next two years and by 2007 it had reduced the number of habitat biologists from 75 to 52 and fisheries officers from 25 to nine. DFO habitat biologists and fisheries officers address compliance and enforcement regulations under the *FA* for all activities occurring in Ontario, including those related to the 2006 MTO Protocol.

ECO Comment

The ECO commends MNR for posting an information notice on the Registry for the 2006 MTO Protocol, however the ministry should have confirmed the availability of the document before doing so. MTO should have followed through with its commitment to repost the proposal with an electronic link, and allowed for an extended review period, 30 days from the date the revised notice was posted. As it was, the public had difficulty exercising their rights under the *EBR*. The ECO is pleased that MTO will provide direct document web-links in future Registry notices. The ECO urges MTO to ensure that titles displayed in notices correctly represent the document and that decision notices are posted within a month or two of the decision, rather than 13 months after the decision was made. These practices are more consistent with MTO's "open" planning process SEV and the *EBR*.

The ESP documents offer extensive, detailed information to support the 2006 MTO Protocol process. The ECO commends MTO for recognizing the need to collate the documentation on protection of fish and fish habitat and to organize ESP documents in a way that makes them accessible to all protocol implementers. MTO invested a great deal of effort in making the documents all-inclusive and science-based. The ECO hopes MTO will ensure that the Fish Guide is regarded as a key resource by MTO staff and its consultants so that its detailed direction is applied and that the ministry is vigilant in filling information gaps. Small stream mapping is an existing gap that should be rectified to help reverse the growing loss of these important aquatic habitats.

One of the values, as articulated in its SEV, that MTO considered in the protocol decision was the importance of integrating the environment into transportation planning. The past approach of routing highways by "connecting the green dots," puts transportation first. In an integrated plan, the "green dots" are connected, not by highways but by natural heritage corridors that enhance ecosystem function; and transportation routes minimize fragmentation of this natural system. Natural heritage systems are determined at a cross-watershed, landscape-scale. This level of planning is crucial for tracking cumulative loss of habitat to ensure that environmental thresholds are not exceeded and that ecosystem function is sustained over the long-term. It is also the most effective technique for ensuring "no net loss" of productive capacity of fish habitat. Landscape plans serve as a valuable reference when site-specific information is incomplete. The ECO encourages MTO to adopt a landscape-scale approach to properly integrate the environment into transportation planning, and meet its SEV. This technique is also more consistent with the existing policies of DFO and MNR, to which the 2006 MTO Protocol must adhere.

The ECO is alarmed by MTO's practice of assessing 90 per cent of its projects as low-risk and then attaching minimal enforcement to them. The lack of fisheries specialists and post-construction monitoring at provincial highway undertakings invite contraventions of the *FA*. Audits of five to ten per cent of projects will not compensate for this shortcoming. To compound matters, recent staff cutbacks will likely challenge DFO in carrying out its duties under the 2006 MTO Protocol, especially the optional ones, such as reviewing "no HADD" decisions by MTO. Under these conditions, the protocol will exacerbate an already flawed system and place more habitat in jeopardy. The ECO strongly advises MTO to support its protocol and ESP investment by requiring fisheries specialists to monitor all provincial transportation undertakings.

SECTION 5

ECO REVIEWS OF APPLICATIONS FOR REVIEW

SECTION 5: ECO REVIEWS OF APPLICATIONS FOR REVIEW

5.1 Ministry of Energy

Review of Applications R2006019 and R2006020:

5.1.1 Need for a Review of Ontario's Policies on Transboundary Smog, Mercury Emissions and Climate Change

(Review Denied by ENG in 2007 and MOE in 2008)

Background/Summary of Issues

In the fall of 2006, the applicants requested that the Ministry of the Environment (MOE) and the Ministry of Energy (ENG) identify measures to eliminate the health, social and environmental impacts caused by Ontario's coal-fired generating stations. In 2003, the Minister of Energy had stated that the Ontario government planned to close the stations by 2007. That date was later extended to 2009. Then in June 2006 the Minister of Energy announced that it could not proceed with its timetable to close all coal-fired generation by 2009. As of May 2008, the planned closure period for the four coal stations operating in the province was established as 2010 to 2014. In addition, the Ontario government proposed, as of May 2008, capping the stations' carbon dioxide emissions during this period. One station was closed by the Ontario government in April 2005 – the Lakeview Station, which had been a major source of air pollutants in the Great Toronto Area.

The applicants noted that the coal station closure promise, made in 2003 with closure in 2007, was to be the cornerstone of the Ontario government strategy to reduce transboundary smog and mercury emissions and deal with climate change. The applicants referred to three environmental initiatives which could be furthered by closing the coal stations:

i) Ontario's compliance with the terms of the Ozone Annex to the 1991 U.S.-Canada Air Quality Agreement.
ii) Ontario's compliance with the proposed Canada Wide Standard on mercury.
iii) Combating Climate Change.

The applicants cited an annual figure of $3 billion in healthcare costs and $371 million in environmental costs associated with the emissions of the coal stations. These cost figures were obtained from an Ontario government sponsored study called "Cost Benefit Analysis: Replacing Ontario's Coal-Fired Electricity Generation."

This application for review was filed on behalf of a number of organizations including the Registered Nurses Association of Ontario, the Canadian Association of Physicians for the Environment, the Muskoka Lakes Association, the Georgian Bay Association, World Wildlife Fund Canada, and the Sierra Legal Defence Fund. At the time of submitting this application, these organizations also produced a media release announcing the plan to submit this application.

Ministry Response

Ministry of Energy (ENG):
The Ministry of Energy denied this application in a letter to the applicants in December 2006 and provided a number of reasons for its decision in its letter.

Ministry of Environment (MOE):
MOE responded in April 2008 by denying this application and cited a number of recent policy initiatives as reasons for its decision. To comply with the requirements of the *EBR*, MOE should have provided a response to the applicants by mid-December 2006. The ministry's response was overdue by many months.

ECO Comment

In early 2007, two of the applicants wrote to the ECO to raise their concerns about the delayed response from MOE and requested that the ECO prepare a special report on the matter. The ECO responded to the applicants by letter, indicating that the ECO shares their concerns about MOE's procedural delays. The ECO also raised the matter with MOE at the time. The ECO will report on both MOE's and ENG's responses in our 2008-2009 Annual Report.

Review of Applications R2007016 and R2007017:

Review of the Need to Prescribe the *Energy Conservation Leadership Act* (Review returned by MOE, undertaken by ENG)

This application was reviewed in conjunction with R2007016 (MOE). Please see section 5.2.5 under the Ministry of the Environment for the full review.

5.2 Ministry of the Environment

Review of Application R0334:

5.2.1 Classification of Chromium-containing Materials as Hazardous Waste (Review Undertaken by MOE)

Background/Summary of Issues

The applicants requested that Regulation 347 under the *Environmental Protection Act* be reviewed. Under the current regulation, a waste is considered toxic if the total chromium extracted from it during a leachate test exceeds 5 mg/L. The applicants said the legislation should differentiate between toxic and non-toxic forms of chromium. Treating a non-toxic material as hazardous places an unnecessary economic burden on industry.

Ministry Response

MOE decided in 1996 to conduct a review.

In December 1997, MOE told the ECO that proposed changes to a federal Transport Canada regulation will deal with this issue. MOE indicated that in the interests of federal/provincial harmonization work, and to avoid duplication of effort, it was waiting for the federal regulation to be finalized before doing its own review.

In December 1998, MOE indicated that this review would be part of the national harmonization initiative review related to the definition of hazardous waste. The ministry stated that it exercises no control over the timing of this federal initiative.

MOE contacted a representative of the applicants in June 2002 and ascertained that the applicants continue to be interested in pursuing this review.

In June 2005, MOE updated the ECO, indicating that the latest published draft federal hazardous waste regulations do not contain an exemption for blue leather tanning waste (the subject waste to which this application pertains) and that it appears the federal government does not intend to exempt it at this time. The ministry says that it will continue to work with Environment Canada to determine whether they intend to pursue such an exemption.

ECO Comment

While the twelve year delay in completing this review seems unreasonable, ECO recognizes that MOE progress is linked to harmonization between provincial and federal standards on hazardous waste regulation. ECO will continue to seek updates from MOE on this process.

Review of Application R2005004:

5.2.2 Review of MOE's Guideline C-4 – Biomedical Waste (Review accepted by MOE)

Background/Summary of Issues

In August 2005, two applicants requested a review of Guideline C-4; the Management of Biomedical Waste in Ontario, administered by the Ministry of the Environment (MOE). The applicants argued that the guideline was over 10 years old, and is unenforceable. They noted that very large quantities of biomedical waste were being discarded into the non-hazardous waste stream; that many unlicenced companies are collecting biomedical waste; and that biomedical waste packaging standards are not being adhered to.

Ministry Response

On December 22, 2005, MOE agreed to carry out a review, and committed to providing the applicants with a copy of the review outcome no later than October 1st, 2006. However, the review remains in progress; in June 2008, MOE advised the ECO that:

- "In February and March 2008, ministry staff conducted initial stakeholder consultations regarding biomedical waste management.
- Ministry staff are currently reviewing the results of the consultation and considering the implications for a revised version of Guideline C4: The Management of Biomedical Waste in Ontario.
- The ministry intends to post any proposed revisions made to the guideline to the Environmental Registry as soon as possible."

ECO Comment

The ECO will review the handling of this application for review in the 2008-2009 Annual Report.

Review of Applications R2006006 and R2006010:

5.2.3 Application for Review to Protect Groundwater of the Waterloo Moraine (Reviews Accepted by MOE)

Background

In June and July 2006, two applications were submitted requesting a new policy or Act to protect the Waterloo Moraine. The applicants seek legislation and policies that would protect the Waterloo Moraine and its environmental features, in particular the groundwater and recharge areas,from unsustainable development. The applicants proposed creating an Act or policy similar to the *Oak Ridges Moraine Conservation Act, 2001*. These applications were forwarded to MMAH and MNR as well as MOE. MNR and MMAH denied the requests. ECO reviewed their handling of these applications in our 2006-2007 Annual Report Supplement, page 157.

Ministry Response

In April 2007, MOE agreed to conduct a review to determine if there is a need to develop provisions to protect groundwater and source water of the Waterloo Moraine beyond what currently exists in policies and legislation. MOE stated it would not review the *Clean Water Act* nor the PPS. MOE expected the review to take 16 months and one month to prepare the report.

ECO Review

The ECO will review the handling of this application for review in the 2008-2009 Annual Report.

Review of Applications R2006019 and R2006020:

Need for a Review of Ontario's Policies on Transboundary Smog, Mercury Emissions and Climate Change (Review Denied by ENG in 2007 and MOE in 2008)

This application was reviewed in conjunction with R2006020 (ENG). Please see section 5.1.1 under the Ministry of Energy for the full review.

Review of Application R2006021:

5.2.4 Review of Section 11.4 of the *Environmental Assessment Act* (Review Accepted by MOE)

Background/Summary of Issues

In October 2006, two applicants requested a review of section 11.4 of the *Environmental Assessment Act* (*EAA*). This section allows residents to request that the Minister of the Environment review a previous EA approval. The applicants made a request in 2003 for a review of the EA approval issued to the Regional Municipality of Hamilton-Wentworth for the Red Hill Creek Expressway. The applicants want, among other things, to see the *EAA* amended so that time limits would be imposed on the MOE when it is asked to conduct a review under section 11.4.

Ministry Response

MOE agreed to undertake this review in February 2007, more than two months after a decision was required.

In April 2008, MOE completed its review and agreed to modify its policies on its handling of section 11.4 *EAA* reviews. In its response, MOE specifically agreed to "make the environmental assessment process more transparent and efficient as it relates to *EAA* section 11.4 and the Minister's decision-making ability to reconsider an approval to proceed with an undertaking if there is a change in circumstances or new information available." In support of this decision, MOE further noted that "the purposes of the *EBR* call for increased accountability of the government of Ontario for its environmental decision-making."

In May 2008, MOE advised the ECO that it never formally responded to the 2003 section 11.4 request for a review of the EA approval for the Red Hill Creek Expressway issued to the Regional Municipality of Hamilton-Wentworth.

ECO Comment

The ECO will review MOE's handling of this review in our 2008-2009 Annual Report.

Review of Application R2006024:

5.2.5 Review of the Need for Regulatory Reform related to Mining Projects (No Response from MOE)

Background/Summary of Issues

In December 2006, the Sierra Legal Defence Fund (SLDF; now Ecojustice Canada) submitted an application for review on behalf of the Wildlands League and Mining Watch Canada. The applicants requested a review of the need for legislative, regulatory and policy reform related to the assessment of the environmental impacts of proposed mining projects under the *Mining Act* and the *Environmental Assessment Act* (*EAA*). This application for review was sent to the Ministry of Northern Development and Mines (MNDM), the Ministry of the Environment (MOE), and the Ministry of Natural Resources (MNR).

As of June 13, 2008, MOE denied this application. The *EBR* required that a decision notice be provided to the applicants and the ECO by March 2007. In February and April 2007 respectively, both MNR and MNDM denied this application. This *EBR* application is discussed at length on pages 218-225 of the Supplement to the ECO's 2006-2007 Annual Report. It was also generally discussed on pages 51-74 of the 2006-2007 Annual Report and the ECO recommended that "MNDM reform the *Mining Act* to reflect the land use priorities of Ontarians today, including ecological values."

Ministry Response

MOE was required to provide notice of its decision on whether it intended to conduct a review to the applicants and to the ECO by March 4, 2007. On April 4, 2007, MOE wrote to the applicants and the ECO that it was "delayed in making a decision on this issue." The ECO subsequently raised the issue of this delayed application on numerous occasions with MOE staff.

ECO Comment

The ECO has serious concerns that MOE is systematically thwarting the application for review process contained in the *Environmental Bill of Rights*. In the case of this application, MOE is more than a year past the legislated timelines. The public's confidence that their legal rights will be upheld is being undermined by the ministry's wilful disregard of legislated timelines. These delays run counter to the core purposes of transparency and accountability that underpin the *EBR*. Further, the ECO cannot effectively fulfil its own duties to report to the Ontario Legislature and to the public if prescribed ministries do not follow their legal obligations.

The ECO commits to reporting fully on this application in a forthcoming Annual Report, following the legally required response by MOE.

Review of Application R2006029:

5.2.6 Review of a Permit to Take Water for the Nestle Aberfoyle Water-Bottling Plant (Review denied by MOE)

Geographic Area: Guelph region

Background/Summary of Issues

On January 24, 2007, two applicants filed an application for review requesting that the Ministry of the Environment (MOE) review a Permit to Take Water (PTTW) that was issued to Nestle Waters Canada in 2005 for the purposes of its Aberfoyle water-bottling facility. The applicants also asked the ministry to review any subsequent renewal applications related to this water-taking permit.

The applicants argued that the Nestle water-taking represents a significant threat to the local aquifer; it jeopardizes Guelph's ability to meet both its future water supply needs and its future population growth targets; and it is contrary to the precautionary principle. Accordingly, the applicants stated that the decision to issue the PTTW to Nestle should be re-evaluated.

Background:
The Aberfoyle facility is located in the Township of Puslinch, in the County of Wellington, near the City of Guelph. This facility has been operating as a commercial bottling facility since the mid-1990s, and is currently owned by Nestle Waters Canada ("Nestle").

When Nestle acquired the Aberfoyle facility in 2001, it was issued a PTTW that allowed it to take up to 1,800 litres of groundwater every minute from the Aberfoyle well, to a maximum of 2.6 million litres per day, 365 days per year. Nestle's PTTW was subsequently renewed in 2003, and again in 2005.

When applying for the renewal of its PTTW in 2005, Nestle requested an increase in the amount of its PTTW, seeking permission to take 2,950 litres per minute, to a maximum of 4.2 million litres per day. This requested increase was opposed by the local Township of Puslinch. The *EBR* applicants included a copy of a 2005 report from the Township's hydrogeologist sent to MOE, which set out the Township's concerns regarding the Nestle water-taking. The report stated that the Nestle water-taking represents a significant threat to the nearby Mill Creek, a regionally significant cold water stream that is already under stress from various other threats (including aggregate extraction). The report also concluded that the Nestle water-taking creates a significant disturbance to the groundwater flow system in the aquifer around the facility.

During the 2005 PTTW renewal application process, officials from the Ministry of Natural Resources (MNR) also expressed concerns to MOE regarding Nestle's proposed increased water-taking from the Mill Creek sub-watershed. The MNR staff expressed concerns that an increase in Nestle's water-taking could have a negative impact on the local trout fishery.

Although MOE did not grant the full amount of the increase requested by Nestle, the ministry did issue the renewal of the PTTW in 2005, increasing the amount of water that Nestle could take to 2,500 litres per minute, to a maximum of 3.6 million litres per day, 365 days a year. For context, this is roughly comparable to the amount of water used by a municipality of 6,000 people. The ministry also included additional monitoring conditions in the 2005 PTTW.

The 2005 PTTW was due to expire on June 30, 2007. Accordingly, on March 30, 2007 (after this *EBR* application was submitted), Nestle filed an application to renew its PTTW, seeking a five-year renewal of the permit (instead of the usual two-year term, as had been issued in the past) at the same rate and amount as the 2005 PTTW. This renewal application was posted as a proposal notice on the Registry on April 2, 2007, and generated over 8000 public submissions registering opposition to the renewal. This is the greatest number of public comments ever received on an instrument proposal notice posted on the Registry. Although the 2005 PTTW was set to expire in June 2007, MOE granted Nestle several extensions until April 2008, while the ministry considered the comments and reviewed the new renewal application.

Nestle's application for the 2007 renewal of its PTTW resulted in a major public outcry from the Guelph community. Guelph relies entirely on groundwater for its municipal drinking-water supply, and local concerns over water security in this area are high. These concerns were particularly high during Nestle's 2007 PTTW renewal application process as the Guelph community was experiencing drought conditions at that time. High temperatures and low rainfall in recent years have resulted in a historically low water table in south-western Ontario. Accordingly, in the summer of 2007, Guelph and several of its neighbouring townships issued an outdoor-watering ban, and in September 2007, the Grand River Conservation Authority declared a Level 2 low-water condition in the area, asking the public to make voluntary cutbacks on their water use.

In an attempt to address public concerns, Nestle held three open houses and public information sessions between March and November 2007. During this period, many community members expressed concerns about a lack of comprehensive information about the local aquifers (including information about the delineation of the aquifers, the relationship between groundwater watersheds, the relations between water withdrawals and recharge rates, and the cumulative impacts of all of the regional water-takings), as well as concerns about a lack of regional water management planning.

On April 17, 2008, MOE finally rendered its decision on the 2007 PTTW application for renewal. MOE granted Nestle a new PTTW for a two-year period (rather than the requested five-year period), at the same rate of water-taking as the 2005 PTTW, with additional and stronger monitoring requirements – such as increasing the frequency of measurement and the number of monitoring locations, as well as requirements for habitat and ecological studies – to better assess whether the Nestle water-taking is having an ecological effect on Mill Creek, the local aquifer, and the adjoining wetlands.

The EBR applicants' arguments for the need to review the Nestle PTTW:
The *EBR* applicants argued that, although the decision to issue the 2005 PTTW to Nestle had been made within five years of the date of this application, many changes have taken place since that decision was made that warrant a fresh review of the permit.

First, the applicants noted that the *Clean Water Act* was passed in 2006. This new Act requires local communities to assess their drinking water sources, to identify significant threats to the quantity or quality of those water sources, and to take necessary actions to reduce, eliminate or prevent any identified significant threats. The applicants contended that the Nestle PTTW represents a "significant threat" to the local source water. Although all of the requirements under the *CWA* will not be in place for several more years, the applicants argued that the ministry should nonetheless take a proactive and precautionary approach, and withhold renewing the PTTW until such time as the local community has completed its source water protection planning, and in particular, its water budget. The applicants argued that the ministry should not be issuing PTTWs that hinder the ability of local communities to protect their own water sources.

Secondly, the applicants noted that the Great Lakes-St. Lawrence River Basin Sustainable Water Resources Agreement was signed by the province of Ontario in December 2005. This Agreement strengthens the requirements for the Ontario government to protect water sources, and in particular, to ensure that water withdrawn from the Great Lakes basin will not result in any significant adverse impacts to the quantity or quality of the applicable source watershed. The applicants argued that the Nestle PTTW is clearly inconsistent with the stated objectives of this Agreement.

Subsequent to this *EBR* application, in August 2007, the terms of the Great Lakes–St. Lawrence River Basin Sustainable Water Resources Agreement were codified in provincial law through the *Safeguarding and Sustaining Ontario's Water Act, 2007*. (A decision review of this Act can be found in section 4.2 of this Supplement.)

Thirdly, the applicants stated that new relevant information had recently become available through the 2006 Guelph Puslinch Water Supply Study. The applicants provided a letter from a hydrogeologist stating that this new study confirms that Nestle's Aberfoyle facility is drawing water from the same aquifer that the City of Guelph and other communities are obtaining their drinking water supplies. The applicants asserted that the Nestle PTTW represents a serious threat to the City of Guelph's future water supply.

The applicants noted that the population of the City of Guelph is slated to grow significantly under the province's Growth Plan for the Greater Golden Horseshoe, and that this population growth will require an increased supply of drinking water. The City of Guelph's 2006 Water Supply Master Plan concludes that the City could quickly outgrow its present supply of drinking water and recommends that the City increase water takings from groundwater sources. The applicants also noted that the amount of groundwater that Nestle is permitted to draw is equivalent to seven percent of the City of Guelph's current daily water use. As such, the applicants argued that Nestle's massive water-taking could jeopardize not only the City of Guelph's ability to meet future water supply demands, but also the province's population growth targets for Wellington County established under the *Places to Grow Act*.

The applicants argued that MOE's decision to issue a PTTW that allows Nestle to take millions of litres of water per day, while the ecosystem impacts of such a massive water-taking on the Aberfoyle aquifer are unknown, is inconsistent with the ministry's guiding principle of taking a precautionary approach to decision-making as required by MOE's Statement of Environmental Values (SEV). Furthermore, as all of the water taken by Nestle is not returned to the watershed, the applicants argued that the ministry is failing to take an ecosystem approach to watershed management, as also required by its SEV. Finally, the applicants argued that issuing the PTTW to Nestle is contrary to the goal of the *EBR* to ensure the protection of the natural environment for present and future generations.

(Note: The applicants are also opposed generally to the Ministry's current practice of issuing PTTWs to commercial water-bottlers. See the Application for Review of "MOE's Policies on issuing PTTWs to Commercial Water Bottlers" in this Supplement at section 5.2.7.)

Ministry Response

On August 9, 2007, MOE denied this application for review. The ministry concluded that a review was not warranted because the 2005 PTTW was evaluated in detail just two years earlier, in May 2005. MOE stated that the 2005 review involved a detailed technical assessment of studies conducted by Nestle. MOE also stated that the technical information provided was evaluated by the ministry against the standards and criteria in place at the time, including the Water Taking Regulation (O. Reg. 387/04) and the PTTW Manual.

Ontario Reg. 387/04, made under the *Ontario Water Resources Act*, requires MOE Directors to consider a list of specified issues when deciding whether to issue or renew a PTTW. Some of the issues that must be considered under this regulation include:

- The potential impact of the water-taking on water levels, water flow, aquatic habitat, and the natural functions of the ecosystem;

- The potential impact of the water-taking on water availability, water balance, and sustainable aquifer yield;
- Other existing uses of water (such as municipal residential drinking water systems); and
- Whether the water taking is in a high- or medium-use watershed, and/or an area with low water conditions.

During the ministry's 2005 technical review of the Nestle PTTW, MOE determined that the additional water-taking requested by Nestle might impact either local water users in the Aberfoyle area or local surface waters. The ministry stated that it therefore reduced the amount of the requested increase, as well as imposed a rigorous local water monitoring program on Nestle in the 2005 PTTW.

In addition, the ministry noted that Nestle's PTTW is again undergoing a thorough technical review by the ministry pursuant to Nestle's 2007 renewal application. MOE pointed out that this renewal application was posted on the Environmental Registry in April 2007 (Registry number 010-0224) for public comment, and that MOE had also notified interested stakeholders of the renewal application and provided them with the supporting technical reports. As a result of the public consultation, MOE received over 8,000 comments from the public. MOE stated that these submissions, as well as the technical issues raised by the public, would be incorporated into the ministry's final decision regarding the PTTW.

The ministry concluded that a review of the Nestle PTTW was unwarranted "since it expired this year and the detailed technical review of Nestle's renewal application provides an equivalent reassessment." The ministry also concluded that "the request for review did not provide any technical, scientific or other evidence to indicate that the decision to issue the former permit was flawed."

ECO Comment

The ministry's decision to not undertake a separate review of the Nestle PTTW was reasonable, as MOE was already undertaking a review of the PTTW pursuant to Nestle's 2007 application for renewal. However, given the overwhelming level of public interest in this matter, as well as the valid environmental concerns raised by the applicants, the ECO feels that the ministry should have provided a greater opportunity for public participation in the existing review.

The *EBR* states that a ministry may provide an enhanced public participation process for an instrument (such as a PTTW) where it is advisable to do so for the purpose of protecting the environment. This enhanced process may include providing additional consultation, information-sharing, and facilitation opportunities, such as holding public meetings, inviting members of the public to make oral representations to the ministry, or facilitating mediations among different stakeholders. Unfortunately, MOE very rarely uses this tool. This PTTW application by Nestle, however, presents a good example of a situation where the level of public interest and the issues involved merit a higher level of consultation.

Throughout the Nestle permitting process, many groups and individuals expressed feelings of extreme frustration about what they perceived as an inability to access information, an inability to meaningfully participate in the Nestle PTTW decision, and a lack of transparency. The ECO believes that the ministry could have played a larger role in facilitating discussions and sharing information to help address those expressed concerns. Although Nestle was conducting some public information sessions of its own, MOE's involvement in the consultation process could have not only helped to gather and share information, but could also have led to a more transparent decision-making process.

In addition, the ECO is disappointed with the ministry's failure to communicate any details regarding its decision to extend the PTTW beyond its expiration date of June 30, 2007, to either the applicants or the public. Despite the fact that MOE extended the 2005 PTTW three times for a total of nine months, MOE provided remarkably little information about the length and cause of the delay. This lack of communication frustrates the public. MOE could easily have provided information to the applicants and the public regarding its interim decision to extend the 2005 PTTW (for example, on the Registry) while it undertook its review of the Nestle's renewal application.

The ECO notes that MOE's practice of allowing a PTTW to be extended indefinitely while the ministry is making its decision about a renewal application can be problematic. Recent amendments to the *OWRA* (not yet in force as of April 2008) now explicitly state that, where a new application for renewal has been filed three months before the expiration date of a PTTW, the PTTW is deemed to be extended indefinitely until a decision is made. This new provision should be applied cautiously, so that delays in ministry decision-making do not drag on for so long that, in effect, a *de facto* renewal is granted without a clear, transparent decision having being made or posted on the Registry. The ECO urges the ministry, where an extended delay in decision-making is expected, at a minimum, to post the proposal notice on the Registry as quickly as possible, and to provide interim notice to the public of both the reason for and the expected length of the delay.

Review of Application R2006030:

5.2.7 Review of MOE's Policy on Issuing PTTWs to Commercial Water Bottlers (Review denied by MOE)

Background/Summary of Issues

On January 24, 2007, two applicants filed an application requesting that the Ministry of the Environment (MOE) review its policy on issuing Permits to Take Water (PTTWs) to commercial water bottling facilities. Specifically, the applicants requested that the ministry develop a policy that expressly states that MOE shall not issue PTTWs to commercial water bottling facilities. The applicants were prompted to make this application as a result of a PTTW issued to Nestle in 2005 for the purposes of its commercial water bottling operations (see the review of the Nestle PTTW application in section 5.2.6 of this Supplement.)

The PTTW Program:
The *Ontario Water Resources Act* (*OWRA*) requires all persons taking more than 50,000 litres of water per day (with some exceptions) to obtain a PTTW from MOE. The Water Taking Regulation (O. Reg. 387/04 under the *OWRA*, formerly called the "Water Taking and Transfer Regulation") and the accompanying PTTW Manual set out factors that MOE Directors must consider (including ecological factors, potential impacts of the water-taking, and the purpose for which the water is being used) when deciding whether to issue or renew a PTTW.

Since 1999, water-takings that transfer water out of Ontario's three main basins (i.e., the Great Lakes-St. Lawrence River Basin, the Nelson Basin and the Hudson Bay Basin) are prohibited. However, this prohibition explicitly excludes certain transfers, including the transfer of water in containers having a volume of 20 litres or less (i.e., water bottles). This prohibition and exception, which was originally included in the Water Taking and Transfer Regulation, was recently elevated to law, when it was incorporated into the *OWRA* in August 2007.

Applicants' Arguments for Review:
The applicants argue that issuing a PTTW to a commercial water bottling operation is contrary to the ministry's Statement of Environmental Values, which states that "the Ministry will adopt an ecosystem approach to environmental protection and resource management." The applicants contend that an ecosystem approach to water management requires that water drawn from a watershed be returned to that source watershed. Accordingly, the applicants argue, an ecosystem approach very simply can not allow water to be taken for the purposes of commercial water bottling, because once the water is bottled, there is no way to ensure that the water will remain in the source watershed.

The applicants note that water taken by commercial bottlers may be shipped anywhere in the world, and that MOE has no means or authority for ensuring that bottled water products remain within the source watershed. Therefore, the applicants urge the ministry to exercise the power that it does have to ensure that water is not transferred outside of the source watershed by simply refusing to issue PTTWs for commercial water bottling facilities.

The applicants also argue that issuing a PTTW to a commercial water bottling operation is contrary to the goals of the *EBR* (as set out in the Preamble to the Act) to ensure that the environment "is used wisely, protected and conserved, and where necessary, restored, for the benefit of present and future generations." The applicants assert that commercial water bottlers remove massive amounts of water from the aquifer, which can prevent recharging of the groundwater aquifer. They state that, not only can this practice cause harm to the environment, it also provides no benefit to the present generation, while squandering a precious public resource for future generations.

Therefore, the applicants recommend that, if PTTWs are to be issued to commercial water bottlers, the ministry should impose a royalty fee for each litre of water taken by commercial bottlers, so that there is a "benefit to present and future generations" as envisioned in the *EBR*, rather than giving Ontario's water away for free to commercial bottlers. Similar to the applicants' position, numerous municipalities in Ontario passed council resolutions in 2007 to petition MOE to place a moratorium on issuing new PTTWs to commercial water bottlers until MOE establishes a royalty payable to the local municipalities. The royalty sought by the municipalities is intended to allow them to develop infrastructure and capacity to safeguard their source waters, as the municipalities argue that there are currently no resources available to offset their costs for groundwater management studies, abating negative impacts, or implementing local initiatives to protect water resources.

Furthermore, the applicants argue that, by issuing PTTWs for water bottling, MOE is encouraging the generation of large volumes of unnecessary and avoidable waste in the form of plastic bottles. The applicants state that, in light of MOE's mandate to reduce the amount of waste in the province, the ministry ought to consider this related issue in the development of its PTTW policies.

Ministry Response

In August 2007, MOE denied this application for review stating that the ministry has reviewed and consulted extensively on its Permit to Take Water program over the last four years. The *EBR* includes a provision that states that a review is not needed if the decision was made during the previous five years in a manner consistent with the public participation requirements of the *EBR*. Accordingly, the ministry concluded that, as this issue has already been reviewed within the preceding five years, this application does not warrant a review.

Specifically, MOE noted that it recently reviewed its Water Taking and Transfer Regulation. In April 2003 and June 2004, MOE provided two separate opportunities for consultation under the *EBR* on the proposed changes to this regulation, inviting the public to submit comments to the ministry. As a result of this review and consultation, the Ontario cabinet passed O. Reg. 387/04 in December 2004, which replaced the previous O. Reg. 285/99. Also, in December 2004, MOE provided another opportunity for comment on the proposed amendments to its PTTW Manual (which came into effect in April 2005). MOE noted that O. Reg. 387/04 and the accompanying PTTW Manual set out rules and policies governing PTTW decisions by MOE Directors, including rules for water takings that remove water from watersheds (such as bottled water).

The ministry also noted that on June 4, 2007, the government implemented its commitments under the Great Lakes-St. Lawrence River Basin Sustainable Water Resources Agreement (2005) when it enacted the *Safeguarding and Sustaining Ontario's Water Act, 2007* (*SSOWA*). MOE consulted with the public in both 2004 and 2005 when it negotiated the Great Lakes-St. Lawrence River Basin Sustainable Water Resources Agreement (see the decision review on pages 13-19 of the ECO's 2005-2006 Annual Report), and again in January and April 2007 when it proposed the recent amendments to the *OWRA* through *SSOWA*. MOE stated that *SSOWA* strengthens the prohibitions of inter-basin transfers, as well as implements new restrictions on intra-basin transfers, in accordance with the Agreement. (A decision review of *SSOWA* can be found in section 4.2 of this Supplement).

MOE also noted that it posted another proposal notice on the Registry in April 2007, seeking comments on its Water Conservation Charges Proposal. This notice described the ministry's proposed water taking charges regulation for some commercial and industrial water users, including water bottlers, which came into force in August 2007. (See the decision review of O. Reg. 450/07 in section 4.9 of this Supplement).

Furthermore, MOE noted that the *Clean Water Act* and its first phase of regulations came into force in July 2007. MOE explained that, under this legislation, local source protection committees will be developing science-based assessment reports for each watershed that will identify vulnerable areas associated with drinking water systems, as well as activities or conditions that pose a significant risk to drinking water quantity and quality. MOE noted that one of the key components of the assessment report is a water budget for each watershed that will identify significant recharge areas as well as the vulnerable areas around drinking water systems. MOE stated that: "It is anticipated that once these water budgets are complete and approved in the province, they will serve as an important tool to help inform PTTW decision-making – and ensure that the water is managed through the program in a long-term sustainable manner."

Finally, MOE stated that, with respect to the applicants' concerns regarding plastic bottles, the ministry acknowledges the importance of reducing waste packaging, and that it "continues to examine options for reducing waste."

ECO Comment

The ministry's decision to reject this application for review of its PTTW policies regarding commercial water bottlers was reasonable, as MOE has reviewed and consulted on its PTTW program fairly extensively during the last five years. As MOE noted in its response to the applicants, the ministry reviewed and amended its Water Taking Regulation (O. Reg. 387/04) in 2004 and its PTTW Manual in 2005, which collectively provide direction to MOE Directors in determining when to issue or renew PTTWs. The ministry also reviewed and strengthened provisions regarding the transfer of water out of Ontario's watersheds, as well as consulted on and implemented a new water taking charge in 2007.

Accordingly, the public (including the applicants) have been provided with a number of recent opportunities to provide input on various aspects of the ministry's water taking program. Nonetheless, given the obvious interest of the applicants in the PTTW program, the ECO is disappointed that the ministry did not advise the applicants of the two existing opportunities for consultation (i.e., for *SSOWA* and the water taking charge regulation) that both began shortly after this application was submitted.

It is worth noting, however, that throughout the various consultations on the water taking program, numerous commenters have repeatedly recommended that the ban on transferring water out of Ontario's basins be extended to include bottled water; but MOE has specifically decided *not* to prohibit out-of-basin transfers in the form of water bottles.

The ECO also notes that this application once again raises the issue of water allocation. The ECO has commented in past reports on the need for the ministry to consider establishing a clear policy for prioritizing water uses to ensure that PTTWs are allocated in both an ecologically sustainable and socially desirable manner (see page 120 of the ECO's 2004-2005 Annual Report, as well as the Supplement to the 2005-2006 Annual Report).

This application, as well as the related Nestle PTTW application for review (see the review in section 5.2.6 of this Supplement) and numerous other PTTW applications on the Registry, illustrate the strong opposition felt by many members of the public to the granting of PTTWs for certain commercial or industrial water uses on the basis that such water takings may threaten the health of the aquatic ecosystem and/or the potential supply of water for other purposes such as drinking water. These concerns are particularly strong in high use watersheds and/or low water conditions where there is a fear that the water resources may be over-allocated. And, with a growing population and growing economy, compounded by the impacts of climate change, these concerns are likely to become more intensified.

However, MOE has previously stated that it does not intend to establish a hierarchy of water uses. The ministry has indicated that, during water shortages, the relative importance of various water uses should instead be made by watershed-based water response teams. Yet, various provincial laws, regulations and policies already do provide some hierarchy of water uses. For example:

- The Ontario Low Water Response program (the province's drought preparedness program) classifies uses as: "essential" (i.e., uses directly related to human health, such as drinking water, sanitation and fire protection, as well as for basic ecological functions); "important" (i.e., agricultural, industrial and commercial uses); and "non-essential" (i.e., household uses such as swimming pools, lawn watering and car washing).
- The *OWRA*, on the other hand, gives certain water uses – domestic, farm and fire-fighting – special status by exempting them from the requirement to obtain a PTTW (in deference to common-law rights of property owners to use water on their property).
- O. Reg. 387/04 suggests a lower priority for certain other water takings by providing that, in "high use watersheds", PTTWs for new or expanded water takings will be refused for beverage and water bottling, fruit and vegetable canning, ready-mix concrete, and other product manufacturing that incorporates more than 50,000 litres/day of water into products.

While such prioritizations of water uses may all be reasonable, these provisions do not comprise a comprehensive hierarchy of water uses and, in some cases, may even be conflicting. Therefore, the ECO again urges MOE to commence a public debate about the possibility of establishing a clear hierarchy of water uses. The ECO believes that such a policy could potentially help ministry staff and water users in responding to drought conditions, as well as help establish a socially desirable PTTW allocating system that protects the health of the ecosystem.

Review of Application R2006033:

5.2.8 Review of the Need to Address Uncontrolled Open Burning in Urban Environments

Background/Summary of Issues

In March 2007, an application for review was filed under the *EBR*, requesting that MOE examine the issue of uncontrolled open burning in urban environments. The applicants argued that the current regulatory framework for open fires is inadequate to protect urban air quality. The applicants noted that Ontario "municipalities are allowed to pass bylaws that enable people to actively violate the *Environmental Protection Act*." They argued that municipalities should not have the authority to regulate this issue and that the province should establish a much more restrictive framework, which might require that only certified wood-burning appliances be permitted, and might set minimum separation distances.

Ministry Response

On May 25, 2007, MOE updated the applicants on the status of this file, noting that a decision was expected by June 29, 2007. However, MOE did not release a decision on this application until mid-June 2008, a year overdue. MOE decided not to undertake this review, stating that "Municipalities are empowered to take action on open burning under the *Municipal Act*, which authorizes municipalities to pass by-laws for prohibiting and abating public nuisances including noise, odour and dust. Banning or restricting open fires in urban environments is a choice municipalities can make."

ECO Comment

The ECO will review MOE's response to this application and will report in our 2008-2009 Annual Report. The ECO observes that MOE's protracted delay on this application runs counter to the intentions of the *EBR* to enhance transparency and accountability in environmental decision-making.

Review of Application R2007003:

5.2.9 Review of Sub-sections 6.1(2) and (3) of the *Environmental Assessment Act* (Review Denied by MOE)

Summary of Issues

In April 2007, the applicants submitted an application for review to the Ministry of the Environment (MOE) requesting that the ministry review sub-sections 6.1(2) and (3) of the *Environmental Assessment Act* (*EAA*). The applicants called for MOE to strengthen the wording in sub-section 6.1(3) because they felt that the current wording was vague and subject to interpretations that undermined the purpose of the Act.

An environmental assessment (EA) is a planning/decision-making process that studies the potential impacts a proposed project (or undertaking) may have on the environment, and assesses ways to mitigate or prevent any expected harms. This process is outlined in the *EAA*. The first step in an application for approval is the submission of a proposed Terms of Reference (ToR) for the EA. The ToR, which must be approved by MOE, is like a workplan and provides a framework for what will be studied in the EA. Public and agency consultation is required prior to submitting the ToR to the ministry.

Section 6.1 of the *EAA* requires a proponent to prepare an EA for a project in accordance with the approved ToR. Sub-section 6.1(2) outlines a list of items that must be included in the EA including a description of the purpose and rationale of the undertaking, description of alternatives for the undertaking, a description of the impacts of the undertaking on the environment, and actions that could be taken to prevent, change, mitigate or remedy the environmental effects.

Sub-section 6.1(2) is subject to an exception outlined in sub-section 6.1(3) which states:

> The approved terms of reference *may* provide that the environmental assessment consist of information *other than that* required by sub-section (2). (emphasis added).

The applicants stated that the words "other than" were vague and subject to two different interpretations. The first was that "other than" could imply providing information "in addition to" what was outlined in sub-section 6.1(2). However, the applicants felt that the provision was being interpreted to mean providing information "different from" what was outlined in the Act. This second interpretation concerned the applicants because it can result in ToRs that do not include the information outlined in sub-section 6.1(2), thereby weakening the EA process and circumventing the purpose of the Act to provide for the protection, conservation and wise management of the environment. This kind of ToR is referred to as a "scoped" ToR.

The applicants proposed that the wording of sub-section 6.1(3) be changed to:

> The approved terms of reference *must* provide that the environmental assessment consist of *that* information required by sub-section (2). (emphasis added).

Sutcliffe Decision:
To support their request, the applicants cited the 2004 Ontario Court of Appeal decision of *Sutcliffe v. Ontario (Minister of the Environment)*. That decision reversed a lower court decision and interpreted sub-section 6.1(3) of the *EAA* as providing the Minister with discretion to permit the proponent, Canadian Waste Services, to submit a scoped ToR for its proposed expansion of the Richmond landfill near Napanee. The case was brought forward by local residents and the Mohawks of the Bay of Quinte to challenge the scoped ToR for the proposed landfill. Canadian Waste Services' ToR omitted the sub-section 6.1(2) requirements of showing a demonstrable need for the proposed expansion, and providing preferable alternatives to the expansion or more suitable sites for the proposed increase in disposal capacity. Please refer to Part 2.2 of the Annual Report for a further discussion of the case.

Environmental Assessment Advisory Panel:
To further illustrate the common use of scoped ToRs, the applicants discussed the historical context of the ToR including referencing the 2005 report by the Environmental Assessment Advisory Panel (hereafter the "Panel"). The Panel was established by MOE in 2004 to recommend ways of improving Ontario's EA process. In March 2005, the Panel submitted its report entitled "Improving Environmental Assessment in Ontario: A Framework for Reform" to MOE.

The report noted that since 1997, 19 of 23 ToRs for waste projects have been scoped, and found that "[t]o date, … it appears that "scoped" Terms of Reference have been the rule rather than the exception under Ontario's EA program." The Panel criticized MOE for not having a policy or guideline that outlined the circumstances where a Minister should or should not approve a scoped ToR, and advised that the absence of such a policy undermined "clarity, predictability, and accountability within the EA program."

The Panel recommended that MOE revise its draft ToR guideline to ensure it emphasized the importance of the "need" and "alternatives to" analyses, as well as specifically set out the circumstances where the Minister may scope the "need" and "alternatives to" analyses within a proponent's ToR.

Other Information

In October 2006, MOE posted for comment a proposal notice for three EA Codes of Practice on the Environmental Registry. The following three codes were implemented in June 2007:

- Code of Practice: Preparing and Reviewing Terms of Reference for Environmental Assessments in Ontario (hereafter "ToR Code")
- Code of Practice: Using Mediation in Ontario's Environmental Assessment Process
- Code of Practice: Consultation in Ontario's Environmental Assessment Process

The ToR Code outlines the steps that must be taken to complete an approved ToR. The ToR Code sets out that "[s]ub-section 6.1(3) states that the approved terms of reference may provide that the environmental assessment consist of information other than the generic requirements as outlined in sub-section 6.1(2)." The ToR Code states that sub-section 6.1(3) was

> designed for proponents who are more advanced in their decision-making and have already identified a specific undertaking for which the consideration of alternatives to is not appropriate, or for which another planning process has developed alternatives to the preferred alternative and the environmental assessment will only need to focus on alternative methods.

The ToR Code describes the proponents that can scope a ToR as private proponents, Crown ministries or agencies that have a "specific mandate or business focus."

The ToR Code advised that "[t]he elements of the environmental assessment that is prepared under sub-section 6.1(3) should not differ drastically from the generic elements outlined in sub-section 6.1(2), and the proponent must be clear in the terms of reference about what will be different." It goes on to say that if proceeding under sub-section 6.1(3), the ToR must set out "detailed requirements for the preparation of the environmental assessment" and "if proponents are limiting the discussion to only look at alternative methods, the terms of reference should identify the alternative methods to be examined or the process by which they will be identified at the environmental assessment stage."

Ministry Response

In February 2008, MOE denied the Application for Review. The ministry failed to meet the timeline requirement under the *Environmental Bill of Rights* (*EBR*) to issue its decision. The *EBR* requires ministries to send a notice of decision with reasons within 60 days of receiving the application. MOE was forwarded a copy of the application for review in early April 2007, and a decision was expected in early June 2007. The ECO contacted MOE in October 2007, to enquire into the status of the decision and express our strong concern over the delay. The decision was finally issued at the end of February 2008, more than eight months late. MOE did not provide an explanation for the delay.

The ministry stated it considered the factors outlined in sub-section 67(2) of the *EBR* when deciding to deny the application. MOE concluded that in light of the information presented in the application, the potential harm to the environment if the review was not undertaken was "minimal." Furthermore, the ministry stated it had recently conducted a review of the environmental assessment process under the *EAA* that resulted in the 2005 report produced by the Environment Assessment Advisory Panel. MOE noted that it complied with the Panel's recommendation to revise the draft ToR guideline and post it for comment on the Registry. Moreover, MOE asserted that the Panel did not state that scoped ToRs in and of themselves undermined the EA process. Rather, the Panel was critical of the lack of policies and guidelines outlining when scoping should or should not be used.

The ministry acknowledged that since 1997, 24 of 78 ToRs submitted were scoped, and 19 of these were for waste undertakings. When considering scoped ToRs, MOE stated it ensured that "all components of sub-section 6.1(2) are present." Regarding ToRs with scoped descriptions of alternative methods or alternatives to the undertaking, MOE stated the proponent may "limit and document the examination of alternatives to one and compare it to the "do nothing" alternative."

MOE also cited the Court of Appeal decision in *Sutcliffe*, stating that the court has provided direction on the interpretation of the Minister's powers to apply the scoping provisions under the *EAA*. MOE stated that the *EAA* sets out a "rigorous" approval process whereby each application is assessed against the "highest standards of environmental protection." In addition, a Government Review Team of technical experts reviews the proponent's EA for accuracy. In the *Sutcliffe* case, the Team concluded there would be significant environmental risks associated with the landfill site expansion. As a result, the Minister refused to approve the undertaking.

Based on the reasons cited above, and the fact that the public was given opportunities to comment on the 1997 legislative reforms, on the 2005 Panel report and the draft ToR Code in 2006, the ministry denied the application for review.

ECO Comment

MOE's reasons for denying the application for review appear to be reasonable. According to section 68 of the *EBR*, the minister is not required to duplicate a review that occurred five years preceding the application for review. The scoping provision of the *EAA* was examined by the EA Panel which resulted in the Panel making recommendations to improve scoping in its 2005 Report. An information notice was posted on the Environmental Registry inviting the public to comment on the report.

Nevertheless, the ECO remains concerned with Ontario's EA process and agrees with the applicants that section 6.1(3) of the legislation is problematic. Although scoped ToRs may have value in principle, section 6.1(3) of the *EAA* is flawed because it does not clearly outline the circumstances when scoped ToRs are appropriate. Therefore, proponents can undermine the EA process by seeking approval for ToRs that do not sufficiently address the core issues of "need" and "alternatives to". Without these elements, review agencies (including MOE) and the public no longer have an opportunity to scrutinize the broad policy issues that underlie a project. For example, if need and alternatives were scoped out of an undertaking aimed at tackling waste management, there would not be an opportunity to comment on the extent of the need, or the relative merits of solutions such as landfills, diversion or energy-from-waste.

The ECO also believes the ToR Code does not rectify the flaws of section 6.1(3) because it lacks the clear direction sought by the Panel, and fails to meet the true intent of their recommendation. The Panel stated MOE should "narrowly prescribe the circumstances where the Minister may limit or scope the consideration of "need" and "alternatives to" within a proponent's EA process...." However, the ECO does not believe the ToR Code does "narrowly prescribe the circumstances" when scoping is acceptable. The ToR Code does not provide specific circumstances, criteria or factors that the Minister must consider when approving the ToR. Instead, the ToR Code suggests that scoping may be acceptable for proponents advanced in their decision-making – which remains ambiguous guidance. For further information on the ToR Code please refer to section 4.15 of this Supplement. Please refer to Part 2.2 of the Annual Report for discussion on EA reforms.

The ECO suggests that section 6.1(3) be amended to provide clear direction on when EAs can be scoped and the criteria that the Minister must consider when deciding to allow a scoped EA. Alternatively, the ToR Code could be substantively improved to provide the clarity sought by the Panel and members of the public such as the applicants in this case.

Also, the ECO is troubled by the ministry's lengthy delay in releasing its decision on this application despite repeated inquiries by the ECO to MOE about the long-passed deadline. MOE did not provide an explanation for the delay. Such delays frustrate the public interest, undermine the *EBR*, and hamper the ability of the ECO to report to the Legislative Assembly.

Review of Application R2007004:

5.2.10 Review of Amended Provisional C of A issued to Environmental Management Solutions (Review Denied by MOE)

Geographic Area: Sudbury

Background/Summary of Issues

In April 2007, the applicants filed an Application for Review of an Amended Provisional Certificate of Approval (C of A) No. A740083 issued to Environmental Management Solutions Inc. (EMS). The C of A was issued under section 27 of the *Environmental Protection Act* (*EPA*) for a soil treatment facility located at the Falconbridge Fault Lake Tailings Area in Greater Sudbury.

The C of A for the facility was first issued in August 1995. A proposal notice for amendments to the C of A was posted on the Environmental Registry for public comment in November 2002. The decision notice was then posted in April 2004.

The applicants are concerned that the provisions of the C of A do not adequately protect the natural environment in the Greater Sudbury Area. They cite the following issues as weaknesses of the C of A:

- Lack of safeguards within the C of A to protect Sudbury's environment. Of particular concern is the uncontrolled transfer of petroleum hydrocarbons from soil to air, contrary to the ecosystem approach outlined in the Ministry of the Environment's (MOE) Statement of Environmental Values (SEV), and MOE's commitment to prevent the release of pollutants to the environment;

- No controls in place for the bio-remediation processing at the facility. The applicants allege that soil is spread into thin layers to aerate before it is used to cover mine tailings, and that no microbial organisms are added to enhance the degradation of soil contaminants;
- Absence of measures to isolate soil piles from the environment;
- Absence of quality controls or monitoring requirements in the C of A. Such measures are minimal at the site;
- No defined limitations on the rate of receipt of contaminated soil at the site; and/
- A provision was not included to subject the facility to periodic review.

In support of the concerns raised, the applicants compared the EMS C of A to that of two other soil treatment facilities in other Ontario communities. The applicants noted that the EMS facility was not covered by a C of A for air under section 9 of the *EPA*, and believed one was required by the Act. In comparison, the other two soil treatment facilities were required to obtain Cs of A for air. Furthermore, the applicants stated that the Cs of A for the other facilities contained significant environmental safeguards including requirements to undertake processing activities within a building, and extensive quality control and monitoring requirements.

MOE gave notice of this application to EMS under section 66 of the *Environmental Bill of Rights* (*EBR*). EMS submitted comments in response to the application in April 2007. EMS stated that its treatment involved the stimulation of adapted bacteria to degrade soil contaminants and does not promote the transfer of contaminants from soil to the air. It also reiterated that its facility was constructed in a manner to isolate contaminated soils from the environment. Moreover, EMS stated that it had not received complaints about nuisances associated with the operation of the facility.

Ministry Response

In March 2008, MOE denied the application for review. The ministry failed to meet the 60-day deadline under the *EBR* to issue its decision on whether to conduct the review. MOE was forwarded a copy of the application for review in mid-April 2007, and a decision was due mid-June 2007. The ECO contacted MOE in October 2007, to enquire into the status of the decision and express our strong concern over the delay. The decision was finally issued mid-March 2008, approximately nine months late. MOE did not provide an explanation for the delay.

MOE stated that it considered sections 67 and 68 of the *EBR* in assessing the application for review. Section 67 and 68 outline factors the minister may consider to determine whether the public interest warrants a review. Upon reviewing these factors, MOE concluded that the C of A included provisions to protect groundwater and surface water, and therefore a review was not warranted.

The ministry explained that it does not require section 9 air approvals for sites that only emit fugitive emissions. Cs of A for air are required when the site has been engineered to create a point source emission. MOE also stated that "[i]t is standard practice to issue a C of A for waste disposal sites without a periodic review period or a set termination date." In this case, the EMS facility was required to submit an annual report to the MOE District Manager detailing its operations, and develop a closure plan.

MOE noted that when the C of A was amended in 2004, all its conditions were reviewed, and if necessary, could have been amended, revoked, or imposed in order to protect the environment. MOE listed the quality control conditions listed in the C of A. These included:

- Specifying the maximum amount of soil permitted on site at one time, the types of contaminated soils that can be accepted at the site, and the criteria soils need to meet before they may be removed from the site after treatment;
- Requiring sampling, monitoring and inspections at the site, as well as surface water monitoring; and,

- Reporting requirements for the operation of the facility, which includes records of soil volumes, soil storage, treatment and analysis, soil disposition, records of sites inspections, annual reporting requirements, and record keeping requirements.

MOE also asserted that there was no regulated requirement for the addition of microbial organisms in bioremediation processes. It confirmed that the site was designed to isolate contaminated soil piles from the environment through the use of a liner and pad to protect the ground water, and a water collection system to impound surface water on site.

MOE verified that no complaints about the EMS facility have been filed to the ministry's Sudbury District Office. A site inspection completed on June 2006, found "no known or anticipated environmental impacts, nor indication of potential for human health impacts or environmental impairment during the inspection."

MOE submitted that the EMS facility and the other two facilities cited by the applicants possessed many different characteristics such as the facilities' designs and the end uses of the treated soils, and therefore were not comparable. It stated that the ministry evaluated each C of A application on its own merits and based its decision on the effects of the activity on the environment.

Lastly, MOE considered section 67(3) of the *EBR* and whether the public interest would be served by a review. The ministry stated that when the proposal notice for the amendments to the C of A were posted on the Registry, no comments were received and no leave to appeal was filed by the public. The applicants had not provided new evidence that suggested a review was warranted. MOE concluded that a failure to review the application would not result in a significant harm to the environment.

Other Information

In response to a 2000 provincial Auditor General of Ontario report that found MOE's procedures and information systems were inadequate for assessing whether Cs of A needed to be updated with new conditions and requirements, MOE published in 2005 four protocols for updating Cs of A for Sewage Works, Drinking-Water Systems, Air Emissions and Waste Management.

The protocols are "intended to help clients and the public understand" the C of A updating process.

The protocols indicate that MOE will review existing Cs of A for Sewage Works, Air Emissions and Waste Management if it receives an application to amend the C of A because of proposed changes to equipment, processes, production rates or for an expansion of the plant capacity.

The Protocol for Updating Cs of A for Waste Management (hereafter the "Protocol") states that "[t]his Protocol contributes to an overall cycle of continuous improvement so that the requirements for existing Cs of A will be made more consistent with the requirements placed on newly issued Cs of A." It also explains that during the first phase of implementation the Protocol will apply to "environmentally significant waste management facilities that are associated with a higher risk of potential impacts on human health and the environment" including: hazardous and non- hazardous waste disposal sites and incinerators, and hazardous and non-hazardous waste processing and/or transfer sites. The Protocol also notes that the public can use the *EBR* to request of review of a C of A.

For a detailed discussion of the protocols please refer to page 81 of the 2004-2005 Supplement, and page 39 of the Special Report "Doing Less With Less."

ECO Comment

MOE's decision to deny the application appears to be reasonable. No evidence, public complaints or reports were presented indicating that the soil treatment facility posed a risk to the environment. Nor were comments submitted in response to the Registry posting of the amended C of A in 2004. Furthermore, MOE reviewed the conditions of the C of A at the time it was amended in 2004, and according to section

68 of the *EBR* the minister is not required to duplicate a review that occurred five years preceding the application for review.

MOE did consider the concerns raised by the applicants and the relevant sections of the *EBR*. However, MOE could have provided greater discussion around its SEV and any potential environmental harms that could result if the review was not conducted.

In addition, MOE could have examined what conditions could be strengthened to prevent potential environmental problems or to bring them into line with current environmental requirements. Although no complaints had been filed or problems reported, MOE should ensure that prevention is emphasized and any possible weaknesses in the C of A are ameliorated. If Cs of A for other soil treatment plants have safeguards that could benefit the EMS facility, these should have been discussed and reasons given as to why they are not necessary for the EMS facility.

The ECO questions the soundness of MOE's standard practice to issue Cs of A without a periodic review period or termination date. It is an issue we have raised before with respect to Cs of A for air on page 164 of the 2006-2007 Supplement. Furthermore, MOE's own protocols on updating Cs of A recognize the environmental implication of outdated Cs of A and the importance of ensuring that Cs of A keep pace with changes in legislative, regulatory and environmental protection requirements.

Given that science, technology, environmental standards and practices change over time, Cs of A issued years ago may become outdated and out of line with the public's expectations of environmental protection. Without a mechanism to review older Cs of A, many facilities may be operating at lower environmental standards compared to facilities with newer Cs of A. Not only do differing standards erode the public's confidence in MOE's ability to protect their environment, it creates an unlevel playing field where one plant may operate under stricter conditions than another simply based on when their C of A was issued. MOE should examine how it ensures outdated Cs of A are updated to current standards, and consider including a review period or termination date in a C of A.

The ECO is troubled by the ministry's extended delay in releasing its decision despite repeated inquiries by the ECO to MOE about the long-passed deadline. MOE did not provide an explanation for the delay. Such delays frustrate the public interest, undermine the *EBR*, and hamper the ability of the ECO to report to the Legislative Assembly. The extended delay suggests that there was a particular issue that troubled the ministry or required in depth examination. If this was the case, this should have been discussed in the decision to better explain the reason for the delay.

Review of Applications R2007005 and R2007006:

Review of the Need for an Act to Protect Cyclists and Improve Urban Air Quality (Review Denied by MMAH; application returned by MOE)

This application was reviewed in conjunction with R2007006 (MMAH). Please see section 5.3.2 under the Ministry of Municipal Affairs and Housing for the full review.

Review of Application R2007007, R2007008, R2007009:

The Need for Municipal Climate Change Adaptation Strategies (Review Denied by MNR, MMAH, undertaken by MOE)

This application was reviewed in conjunction with R2007007 (MNR) and R2007008 (MMAH). Please see section 5.4.4 under the Ministry of Natural Resources for the full review.

Review of Applications R2007010, R2007011, and R2007012:

Review of the Need to Protect the Paris Galt Moraine (Review Denied by MMAH & MNR, Undertaken by MOE)

This application was reviewed in conjunction with R2007011 (MNR) and R2007012 (MMAH). Please see section 5.3.3 under the Ministry of Municipal Affairs and Housing for the full review.

Review of Application R2007013:

5.2.11 Certificates of Approval (Air) issued to ArcelorMittal Dofasco Inc. for the KOBM Melt Shop (Review Denied by MOE)

Background/Summary of Issues

In June 2007, two applicants submitted an application requesting a review of three Certificates of Approval for Air Emissions (Cs of A), issued to ArcelorMittal Dofasco Inc. (Dofasco) for its Klöckner Oxygen Blowing Maximillanshuette (KOBM) meltshop in Hamilton. The applicants assert that years of visible emissions from the KOBM meltshop, ongoing problems with sooty particulate discharges in nearby neighbourhoods, and a lack of appropriate response from the Ministry of the Environment (MOE) and Dofasco led them to request a review. The applicants asked that MOE review and update the Cs of A for the meltshop to resolve particulate discharge problems at the facility as well as address other community concerns related to the facility's operations.

Background:
Air quality has been an issue in some urban and rural communities for centuries. Following the Industrial Revolution, conditions in many cities began to worsen. Among Ontario cities, Hamilton's air quality has historically been identified as very poor. For example, in 1996, the highest annual mean in total suspended particles in Ontario was recorded in Hamilton, downwind from Dofasco's steel-making facility. Hamilton's poor air quality has been attributed to a combination of factors: the high use of Hamilton roads by commuters and transport trucks; the number of industries; the local topography and prevailing weather conditions; and trans-boundary pollution from the mid-western United States.

The City of Hamilton, the provincial and federal governments, and several not-for-profit organizations have implemented initiatives to improve Hamilton's air quality. These initiatives, which include VISION 2020, Clean Air Hamilton, and the Hamilton Industrial Environmental Association, work toward this goal by conducting scientific research, informing public policy, implementing education campaigns, and funding tree planting programs. The Hamilton Air Monitoring Network, which includes 22 industrial partners and the City of Hamilton, uses air monitoring stations to assess local air quality and provide air quality reports to MOE. In addition, MOE operates three air monitoring sites in Hamilton to generate an

Air Quality Index (For further discussion on the Air Quality index, see Part 2.4 of this Annual Report). As a result of these efforts, Hamilton has one of the most highly monitored airsheds in the province.

Although Hamilton's air quality has improved substantially over the years, the levels of air pollution remain higher than or comparable to that of other communities in southern Ontario. Moreover, while there have been significant reductions in the air levels of some pollutants (e.g., benzene, total reduced sulphur), ambient levels in the airshed for others, such as fine particulate matter ($PM_{2.5}$), have changed very little. A large number of hospital admissions and premature deaths have been attributed to Hamilton's poor air quality.

For several years, the residents of northeast Hamilton have complained that fallout events, which almost always involve the deposition of fine black airborne particles in their area, have caused damage to property and negatively affected their quality of life. In the mid-1990s, one telephone survey undertaken by the Hamilton-Wentworth Air Quality Initiative, found that almost 75 per cent of the over 400 polled residents of northeast Hamilton had experienced disruptions in lifestyle due to deposits of black sooty material. During the summer of 2006, several complaints of black sooty fallout led MOE to undertake sampling at residential properties, inspect industrial operations known to be sources of particulate emissions, and subsequently produce a report on the fallout events. The report, released by MOE in November 2006, concluded that while the reported incidents of black fallout in summer 2006 could be attributed to the industries in the north end of Hamilton (e.g., Dofasco, Columbian Chemicals, and Stelco Steel), the incidents could not be definitively ascribed to any one emissions source. Dofasco's KOBM meltshop is located approximately 0.5 - 4.5 kilometres from the residences in the main fallout complaint area.

Summary of Issues:
In June 2007, two applicants submitted an application requesting a review of three Cs of A, #8-2019-75-786, #8-2090-78-957 (formerly #8-2090-78-006), and #2974-53VRDR (formerly #8-2057-87-006), issued to Dofasco for its KOBM Meltshop in Hamilton. The applicants called for the review for the following reasons.

The Cs of A (Air) Need Updating:
The applicants believe that the Cs of A (Air) issued to the meltshop are exceptionally deficient in detail and lack basic conditions that the ministry would incorporate into Cs of A for a similar plant if it was approved for operation today. The applicants state that two of the Cs of A include only a limited number of conditions and that these conditions do not adequately protect the surrounding environment from the potential impacts of emissions. The other C of A, which was issued in 1978, includes no operating conditions whatsoever.

A New Secondary Emissions Control System is Long Overdue:
The applicants state that as far back as 2001, Dofasco itself has acknowledged problems with the meltshop's Secondary Emissions Control System. In four annual reports released between 2001 and 2004, Dofasco provided the levels of six melt-shop emitted pollutants (chromium, copper, lead, manganese, nickel, zinc, and their compounds) that were reported to Environment Canada's National Pollutant Release Inventory (NPRI). To reduce the levels of these contaminants, Dofasco mentioned in its 2001, 2002, and 2003 annual reports that its action plan was to "optimize [the] KOBM Secondary Emissions Control System." In its 2004 annual report, Dofasco wrote that a "new KOBM Secondary Emissions Control System [would] be installed at end of 2007." Despite increases in the levels of some of the six contaminants, Dofasco's 2005 and 2006 annual reports make no mention of the pollutant levels reported to the NPRI or of a new KOBM Secondary Emissions Control System.

Regular Stack Testing and Continuous Emissions Monitoring are Needed:
The Cs of A (Air) do not contain conditions requiring Dofasco to conduct actual testing of emissions from the meltshop sources. Because "past Dofasco annual reports have identified emissions from the KOBM Meltshop as containing pollutants at levels high enough that they must be reported to the federal government's National Pollutant Release Inventory," the applicants believe that the Cs of A should require the company to conduct regular, comprehensive testing of the plant's emission sources. The applicants

state this would provide true measurement of the contaminant levels emitted from the plant and enable MOE to determine whether the facility is in compliance with provincial standards. The applicants also believe the Cs of A should require Continuous Emissions Monitoring of total suspended particulate matter and respirable particulate matter at key emission points within the meltshop operation.

Consideration of the Cumulative Impacts of Air Emissions is Needed:
The meltshop Cs of A (Air) contain no conditions requiring consideration of the entire airshed. While facilities must consider their own emissions, the applicants are concerned that industries are not required to consider the effects their emissions may have when combined with background conditions and emissions from other facilities within the airshed. The applicants cite a recent environmental screening report as evidence that the cumulative effect of emissions from the numerous industrial facilities in Hamilton have an impact that exceeds maximum acceptable limits.

Ontario Reg. 419/05 Will Not Address Community Concerns in a Timely Manner:
Although O. Reg. 419/05 under the *Environmental Protection Act* (*EPA*) includes a number of new and more stringent air emissions requirements, the iron and steel sector is not required to comply with the new requirements until 2010. Moreover, the new regulation allows Dofasco to seek approval to extend its compliance date beyond 2010. The applicants believe that the 2010 implementation timeline is too long a period of time to wait for a community that has already had to contend with years of "problematic emissions" from the meltshop.

Observations of Ongoing Problems with Visible Emissions:
The applicants submitted visual observations and photographic documentation as evidence that emissions problems from the meltshop are chronic and frequent. The applicants believe that the observations and photographic documentation serve as evidence of possible non-compliance with section 14(1) of the *EPA*, which states that no person shall discharge a contaminant into the natural environment that causes or is likely to cause an adverse effect. Moreover, the applicants believe that the submitted evidence indicates possible non-compliance with section 34(1) of O. Reg. 419/05 under the *EPA*, which at the time of submission stated that "no person shall cause or permit an emission into the air that obstructs the passage of light to a degree greater than 20 per cent at any point."

Need For Communication:
The applicants believe that it is important that the public have a clear channel of communication with Dofasco to express concerns about emission problems. While the applicants acknowledge that Dofasco does accept public complaints, they note that the telephone number to call is not posted in visible locations near the plant.

Ongoing Problems with Sooty Particulate Discharge into Nearby Neighbourhoods:
The applicants submitted photographic and written documentation of the summer 2006 fallout events as evidence that there may be emitters in the area who are out of compliance with section 33 of O. Reg. 419/05. This section of the *EPA* states that no person shall cause or permit to be caused the emission of any air contaminant to such extent or degree as may cause discomfort to persons, cause loss of enjoyment of normal use of property, interfere with normal conduct of business, or cause damage to property. The applicants state that while MOE could not identify one specific source of the fallout, wind patterns repeatedly pointed to Dofasco as a potential source.

Recommendation Made in Clean Air Hamilton's 2006 Progress Report:
The applicants note that their request for a review of the meltshop's Cs of A (Air) reinforces recommendations made by Clean Air Hamilton, a multi-stakeholder organization (which includes MOE representatives) dedicated to improving Hamilton's air quality. In particular, Clean Air Hamilton recently recommended that a plan to address future impacts of particulate fallout should require "companies to speed up and refine their plans for controlling pollution sources that may contribute to fallout."

MOE Has No Protocol That Requires Regular Reviewing or Updating of Cs of A:
The applicants believe MOE should undertake this review since there is no protocol that requires any regular reviewing and updating of Cs of A.

Matters that MOE Should Consider in its Review of the Application:
Given the above reasons for the submitted application, the applicants requested that the Cs of A (Air) be reviewed and revised to require:

- that Dofasco "follow through on its commitment to update the KOBM Secondary Emissions Control System by the end of 2007;"
- the installation of a Continuous Emissions Monitoring System to monitor total suspended particulate matter and respirable particulate matter and for the monitoring results to be made public;
- comprehensive stack testing at the meltshop's main discharge point at least annually and for the test results to be made public;
- consideration of the cumulative impacts of the meltshop emissions on Hamilton's airshed and the establishment of contaminant limits; and,
- the posting of a 24-hour telephone number for public concerns at the main gates of the plant.

Ministry Response

In February 2008, MOE denied the application for review on the grounds that Dofasco's meltshop operations will be reviewed in an application for a Comprehensive C of A (Air) that Dofasco plans to submit by fall 2008. This Comprehensive C of A would replace the three existing Cs of A and include the addition of new or historically unapproved sources to cover all air emissions from the meltshop (as well as the rest of the steel plant). Dofasco's plan for the submission of an application for a Comprehensive C of A includes an Emissions Summary and Dispersion Modelling report (ESDM) (as required under O. Reg. 419/05), an emissions inventory for the facility, and the development of a management plan in which all emissions will be assessed, categorized and remediation methods determined. Once the application is received by MOE, the proposal for the Comprehensive C of A (Air) would be posted on the Environmental Registry for public review and comment.

MOE also denied the application for review on the grounds that, in the ministry's opinion, the potential for harm to the environment if the review were not undertaken is not significant. MOE's reasoning that there would be no significant harm to the environment is based on several factors:

- The KOBM meltshop has been constructed and operates with Cs of A (Air) to protect the health of the public and the environment;
- Dofasco is in the process of making improvements to the meltshop's Secondary Emissions Control System, as identified in Dofasco's 2006 Strategic Air Emission Improvement Plan;
- MOE's report on the black fallout incidents of summer 2006 did not identify a definitive source of the fallouts; and,
- MOE conducts regular inspections of Dofasco's Hamilton operations. The ministry stated that the meltshop was last reviewed on November 7, 2007 to ensure that planned upgrades to the air control systems were on track. The ministry also stated that progress on updates would be reviewed again in June 2008 and that an MOE inspector attends the meltshop on a weekly basis to ensure compliance.

As reported in the ECO's 1994-1995 Annual Report, MOE takes the position that the ministry is not required to consider its Statement of Environmental Values (SEV) when it makes decisions on instruments. Thus, ministry staff would not have considered MOE's SEV in making this decision. The ECO strongly disagrees with MOE's interpretation of how the SEV requirements apply to instruments. The ECO believes that all environmentally significant decisions of the ministries are subject to the SEV consideration under section 11 of the *EBR*.

The ministry responded to the applicants' reasons for a review as follows:

The Cs of A (Air) Need Updating:
Dofasco remains on target to submit an application for a Comprehensive C of A (Air) by fall 2008, which would replace the existing Cs of A and therefore eliminate the need to update them.

A New Secondary Emissions Control System is Long Overdue:
Dofasco has identified improvements to the meltshop's Secondary Emissions Control System in its Strategic Air Emission Improvement Plan. These improvements, which include the replacement of duct works, the implementation of a feedback system, and repairs to the Hot Metal Transfer Baghouse, were initiated in May 2007 and will continue through 2009.

Regular Stack Testing and Continuous Emissions Monitoring are Needed:
The ministry responded that current technology in use at the meltshop limits the application of annual stack testing or Continuous Emissions Monitoring. Because emissions escape through large vents, rather than stacks, and because emissions are further treated by a flare located after monitoring points, MOE stated that these monitoring methods are not an efficient means of confirming compliance at the meltshop. Dofasco has stated that it is not aware of any existing technology to measure fugitive emissions using stack testing or Continuous Emissions Monitoring. Nonetheless, because MOE considers the use of Continuous Emissions Monitoring and the need for source testing requirements during its review of all Cs of A (Air), MOE stated that these matters will be considered as part of the ministry's review of Dofasco's Comprehensive C of A when submitted. Moreover, although not directly related to source testing, MOE stated that a Comprehensive C of A would require Dofasco to make the Emissions Summary Table from its Emissions Summary and Dispersion Modelling report publically available.

MOE stated that since technology doesn't presently permit measurements at the stack, its approach is to monitor particulate matter through a number of air monitoring stations located throughout Hamilton. In addition, video roof monitoring is currently used to monitor emissions from the KOBM meltshop.

Consideration of the Cumulative Impacts of Air Emissions is Needed:
In response to the applicants' concern that the Cs of A contain no conditions requiring consideration of the entire airshed, the ministry stated that it currently "requires industrial facilities to assess all air emissions and their impact from an airshed perspective to determine compliance with O. Reg. 419/05." To complement this, MOE mentioned that it undertakes air quality assessments to determine whether or not an airshed is stressed and what conditions should be imposed in the C of A for air emissions for facilities located within that airshed.

Ontario Reg. 419/05 Will Not Address Community Concerns in a Timely Manner:
The ministry stated that should Dofasco submit and receive approval for a Comprehensive C of A (Air) in 2008, it would be in compliance with O. Reg. 419/05 standards prior to 2010.

Observations of Ongoing Problems with Visible Emissions:
In response to the applicants' concern that visual observation and photographic documentation suggest that the meltshop is in non-compliance with section 14(1) of the *EPA* and section 34(1) of O. Reg. 419/05, MOE confusingly stated that the ministry's report on the summer 2006 black fallout incidents did not identify a definitive source of the particulate matter.

Need For Communication:
The ministry's decision summary indicated several Dofasco initiatives to communicate with neighbours, including establishing a 24-hour phone number and distributing literature to every household in the area concerning what residents should do if they have a concern.

Ongoing Problems with Sooty Particulate Discharge into Nearby Neighbourhoods:
In its role as a regulator of all facilities that have the potential to result in air emissions, MOE stated that it conducts regular inspections of Dofasco's Hamilton operations and that it last reviewed the meltshop on November 7, 2007. The ministry's decision summary also indicated that MOE is currently reviewing a contingency plan submitted by Dofasco for quick and organized responses to fallout incidences.

The ministry stated that it has implemented a 24/7 procedure to respond to complaints of fallout incidents, placed samplers on some residential properties for analysis, partnered with scientific authorities for the analysis of mobile air monitoring data, and committed to tracking down responsible sources.

The ministry's decision summary cites Dofasco's claims that the KOBM meltshop does not emit sooty or carbonaceous particles and therefore a review of the meltshop's Cs of A would not address the applicants' concerns regarding the black sooty fallout incidents.

Recommendation Made in Clean Air Hamilton's 2006 Progress Report:
In response to Clean Air Hamilton's recommendation that companies speed up and refine plans for controlling pollution sources that may contribute to black fallout, MOE pointed to Dofasco's Strategic Air Emission Improvement Plan and the initiatives in this plan implemented by Dofasco.

MOE Has No Protocol That Requires Regular Reviewing or Updating of Cs of A:
Although MOE acknowledged that Cs of A are not subject to periodic review, the ministry pointed out that Dofasco's planned application for a Comprehensive C of A (Air) would involve a review of the meltshop's operations. While a Comprehensive C of A would give Dofasco flexibility in making some modifications to the meltshop without requiring amendments, this type of C of A contains a mandatory five-year review cycle.

Other Information

In February and March 2008, Hamilton media reported on several incidents of visible emissions released from Dofasco's steel plant. In particular a huge red plume was produced on March 10, 2008 when excess molten iron from Dofasco's blast furnace was poured into shallow pits in a process called 'coffining' (or 'beaching'). In this case, the presence of moisture in the pits (or 'coffins') resulted in iron oxide particles being emitted into the air. In April 2008, MOE issued a control order to Dofasco focusing on the operating procedures used in the coffining process. The control order does not address emissions from Dofasco's KOBM melt shop.

ECO Comment

The Ministry of the Environment was exceptionally late (six months overdue) in issuing its decision on this application. Although MOE was required under the *Environmental Bill of Rights* (*EBR*) to provide a decision by August 29, 2007, it did not respond to deny this application for review until February 27, 2008, when newspaper headlines and public pressure appear to have forced the Minister of the Environment to act. The ECO is disappointed that MOE delayed its response by six months, especially given the ongoing frustration of Hamilton residents with air quality issues.

The ECO believes that MOE's decision to deny this review is reasonable, but only because Dofasco has demonstrated to MOE its intention to apply for a Comprehensive C of A. Since Dofasco's application for a Comprehensive C of A will require MOE to review the meltshop's operations and mitigation measures, and because the Comprehensive C of A, if approved, would replace the meltshop's existing Cs of A and be required to be in compliance with O. Reg. 419/05, the ECO believes that a review of the meltshop's current Cs of A would be redundant. The ECO is of the opinion that MOE's review of a Comprehensive C of A will address the applicants' concerns that the Cs of A need updating and that O. Reg. 419/05 will not address community concerns in a timely manner. Nonetheless, the ECO's agreement with MOE's decision to deny this review is contingent on MOE's consideration of other issues raised in the application when reviewing Dofasco's application for a Comprehensive C of A (Air).

The ECO encourages MOE to monitor Dofasco's progress in improving the meltshop's Secondary Emissions Control System and subsequently monitor the resulting reduction in the meltshop's emitted levels of pollutants. Although the ECO disagrees with the applicants' assertion that statements in Dofasco's annual reports qualify as a "commitment" to update the KOBM Secondary Emissions Control System, the ECO believes that MOE is responsible for ensuring that the meltshop's air quality controls are sufficient to meet the contaminant concentration standards in O. Reg. 419/05. The ECO therefore urges MOE to consider imposing requirements for additional secondary emissions controls, if needed, when reviewing Dofasco's application for a Comprehensive C of A (Air).

Likewise, the ECO encourages MOE's review of Dofasco's application for a Comprehensive C of A to address the applicants' concern regarding visible emissions from the meltshop. In response to the applicants' assertion that visual observation and photographic documentation suggest that the meltshop is in non-compliance with section 14(1) of the *EPA* and section 34(1) of O. Reg. 419/05, MOE stated that the ministry's report on the summer 2006 black fallout incidents did not identify a definitive source of the particulate matter. The ECO finds MOE's response confusing since the issue of visible emissions from the meltshop is a separate matter from the fallout incidents. Although MOE altered its requirements to trigger enforcement related to alleged contraventions of opacity provisions under section 34(1) of O. Reg. 419/05 in April 2008 and made them more permissive than when the applicants submitted their application, the ECO reminds MOE that it is still responsible for responding to this concern.

In May 2008, the ECO visited the ArcelorMittal Dofasco steel plant to observe improvements to the meltshop's Secondary Emissions Control System, as well as changes to the plant's coffining procedures (see 'Other Information' above).

The ECO has learned that the frequent visible emissions observed from the meltshop in early 2008 were a result of the corrosion and eventual collapse of a large section of ductwork in the meltshop's Secondary Emissions Control System. As a result of this collapse, fumes escaped before going through an air scrubber. Dofasco replaced this ductwork in April/May 2008 as part of the improvements identified in its Strategic Air Emission Improvement Plan. When reviewing Dofasco's Comprehensive C of A application, the ECO urges MOE to evaluate the reduction in visible emissions resulting from the ductwork replacement and consider imposing additional air quality controls if visible emissions violate the *EPA*.

With respect to the applicants' concern that the existing Cs of A do not consider the cumulative impacts of emissions, the ministry responded that MOE "requires industrial facilities to assess all air emissions and their impact from an airshed perspective to determine compliance with O. Reg. 419/05." The ECO notes, however, that this regulation makes no mention of cumulative impacts or the consideration of the local airshed. In fact, MOE itself has acknowledged (in other circumstances) that "[O. Reg. 419/05] does not explicitly deal with background concentrations, cumulative or synergistic effects, persistence and bioaccumulation of contaminants." Likewise, the Environmental Review Tribunal stated in April 2007 that "O. Reg. 419/05 focuses on individual emission standards" and that "numerical standards for the emission of particular contaminants, such as those provided in O. Reg. 419/05, cannot take cumulative impact into consideration because it is not possible to know the surrounding activities and baseline conditions of local ecosystems at the time the standard is set." Cumulative effects are of significant concern in stressed airsheds like Hamilton. If MOE is serious about taking an airshed perspective in this case, the ECO would expect MOE to consider the background concentrations and cumulative impacts of some key contaminants (e.g. $PM_{2.5}$, lead, chromium, nickel) when setting emissions limits for Dofasco's Comprehensive C of A.

The ECO recognizes that current technology precludes stack testing and Continuous Emissions Monitoring at the KOBM meltshop. Nevertheless, the ECO does not believe that the ministry's suggested alternative (i.e., monitoring particulate matter using air monitoring stations throughout Hamilton) is an equivalent method for measuring contaminant levels emitted from the meltshop and evaluating facility compliance with provincial standards. While ambient air monitoring is beneficial for measuring the impacts of emissions on a particular area, it is not useful in attributing emissions to a particular source, especially in a polluted airshed like Hamilton. The ECO is reassured by MOE's statement that Continuous Emissions Monitoring, source testing, and reporting requirements are considered in the ministry's review of all Cs of A (Air) and encourages MOE to consider suitable alternatives when reviewing Dofasco's Comprehensive C of A.

In summary, the ECO believes that the anticipated MOE review of Dofasco's application for a Comprehensive C of A (Air) negates the necessity for a review of the meltshop's existing Cs of A (Air). However, this position is based on the assumption that MOE will consider several relevant factors when conducting this review: the effectiveness of Dofasco's planned improvements in reducing pollutant levels and visible emissions; the cumulative impacts of emissions on the local airshed; and appropriate alternatives to stack testing and Continuous Emissions Monitoring.

The applicants are concerned that no MOE protocol requires any regular review or update of Cs of A, pointing out that the meltshop's 1978 C of A describes no operating conditions whatsoever. The ECO shares the applicants' concern and noted in its 2006-2007 Annual Report that "throughout Ontario, many facilities are operating under outdated Cs of A. As a result, there are inequities between more recently licenced facilities – which generally need to meet the most modern and stringent standards – and older permitted facilities, which often continue to operate under outdated standards and models." The ECO acknowledges that as the stricter emissions standards in O. Reg. 419/05 take effect between 2010 and 2020, facilities will be expected to examine their emissions and determine whether new pollution controls are needed. However, as the ECO has previously stated, "the success of this regulatory reform will depend on a significant beefing up of MOE's inspection, compliance and enforcement capacity." Moreover, since even within this new regulatory framework there is still no requirement that Cs of A (other than Comprehensive Cs of A) be regularly reviewed, the ECO recommends that MOE consider the need for a protocol to review Cs of A on a regular basis.

Review of Application R2007014:

5.2.12 Review of the Need to License and Accredit Laboratories
(Decision was due from MOE October 16, 2007)

Background/Summary of Issues

On August 9, 2007, the ECO received two related applications that together would require incoming wastes to a landfill site to be tested and results to be tracked, and testing laboratories to be licensed and accredited. The applicants based their requests on incidents that occurred at the Warwick Landfill Site in which testing of incoming wastes revealed that they did not comply with the site's approval even though testing at the site where the waste was generated indicated otherwise. As a result, the applicants were concerned that non-hazardous waste landfill sites that are not testing incoming wastes may be unknowingly receiving hazardous wastes or prohibited wastes in violation of their approvals. In addition, based on the applicants' investigation into the incidents at the Warwick Landfill Site, they believe that inconsistent methods of sampling and/or testing by laboratories contributed to the inconsistencies in the test results.

In this request, the applicants requested a review of the need for R.R.O. 1990, Regulation 347 – General – Waste Management ("Reg. 347") to be amended to require that:

- Those involved in sampling and analyzing material for the purpose of waste registration to be accredited and licensed for all parameters listed in Schedule 4 of the regulation to ensure more consistent results and fewer discrepancies;
- All landfill sites be required to perform confirmatory testing upon arrival of registered wastes to ensure that non-hazardous waste sites are not accepting hazardous wastes. Confirmatory testing would ensure that incoming wastes are characterized correctly and that errors at the source site, truck loading, material handling and/or shipping don't result in hazardous waste being deposited in non-hazardous waste sites; and,
- All landfill sites keep incoming wastes from different sources separated until the confirmatory testing results are known and accepted.

The applicants noted that confirmatory testing is an important quality control measure that is not required at all sites, creating an uneven playing field.

As explained by the applicants, MOE does not accredit waste testing laboratories, which is done by a laboratory association. In addition, MOE does not report infractions to the laboratory association. In fact, the applicants advised that MOE does not consider inconsistent lab results a violation and has no means of connecting incidents of inconsistent lab results since it logs incidents at landfill sites by site and company, not by laboratory performing the testing.

The applicants provided nine examples in which confirmatory testing had been effective at the Warwick landfill site in identifying prohibited incoming wastes. In eight examples, testing of wastes (contaminated soils) at the source site for prohibited contaminant levels indicated acceptable levels. However, the results were not confirmed by follow-up testing at the landfill site, which found unacceptable levels of contaminants, often lead. In all of these examples, initial test results had indicated incorrectly that the contaminated soils were suitable for use as daily cover. The initial testing had involved multiple sources of incoming wastes that together had been tested by a total of six different laboratories. In a ninth example, the initial test results were correct but a shipping error had resulted in the wastes being shipped to the wrong landfill site, contrary to the requirements of Reg. 347.

The applicants also provided a copy of a letter dated June 20, 2006, from MOE confirming earlier statements that it was not planning to create a database to track laboratories that provide false results although it will continue to track and follow-up on non-compliance with acts and regulations.

In a related *EBR* request, two other applicants requested that MOE establish a database to track incidents in which waste testing at the landfill site does not confirm the results of testing at the source site. For additional information on this application, refer to section 5.2.13 of this Supplement (Application R2007015).

In both requests, the applicants noted that Fine Analysis Laboratories (FAL) had been charged in 2002 with falsifying certificates of analysis and that MOE had been unaware of any problems with FAL's test results until they were revealed by a former employee of the laboratory.

ECO Comment

The *EBR* requires that MOE make a decision whether or not to undertake the review within 60 days of receiving the application. Although the decision was due October 16, 2007, MOE still had not replied in May 2008. The ECO considers MOE's lack of action an abuse of the intent and purpose of the *EBR* of providing Ontarians with opportunities to better the environment in a timely manner, in addition to being out of compliance with section 70 of the *EBR*.

Review of Application R2007015:

5.2.13 Review of Need to Monitor Waste Testing Laboratories (Decision Due from MOE October 16, 2007)

Background/Summary of Issues

On August 9, 2007, the ECO received two related applications that together would require incoming wastes to a landfill site to be tested and results to be tracked, and testing laboratories to be licensed and accredited. The applicants based their requests on incidents that occurred at the Warwick Landfill Site in which confirmatory testing revealed that incoming wastes did not comply with the site's approval even though testing at the site where the waste was generated indicated otherwise. As a result, the applicants were concerned that non-hazardous waste landfill sites that are not testing incoming wastes may be unknowingly receiving hazardous wastes or prohibited wastes in violation of their approvals. In addition, based on the applicants' investigation into the incidents at the Warwick Landfill Site, they believe that inconsistent methods of sampling and/or testing by laboratories contributed to the inconsistencies in the testing results.

In this request, the applicants requested that MOE review the need for a new waste management policy establishing a mechanism to monitor sampling methods and laboratories that test wastes. According to the applicants, a database should be used to store incidents in which the results of waste testing at the source site differ from the results of waste testing at the landfill site. The applicants believe that MOE would then be able to identify repeat offenders and take disciplinary action against laboratories that were consistently involved in such incidents. The applicants believe also that laboratories would be more diligent in their sampling and testing of wastes if such a policy were in place.

As explained by the applicants, MOE does not accredit waste testing laboratories, which is done by a laboratory association. In addition, MOE does not report incidents to the laboratory association. In fact, the applicants advise that MOE does not consider incompatible lab results a violation and has no means of connecting incidents of inconsistent lab results since it logs incidents by site and company, not by laboratory performing the testing.

The applicants provided nine examples in which confirmatory testing had been effective at the Warwick landfill site in identifying prohibited incoming wastes. In eight examples, testing of wastes (contaminated soils,) at the source site for prohibited contaminant levels indicated acceptable levels. However, the results were not confirmed by follow-up testing at the landfill site, which found unacceptable levels of contaminants, often lead. In all of these examples, initial test results had indicated incorrectly that the contaminated soils were suitable for use as daily cover. The initial testing had involved multiple sources of incoming wastes that together had been tested by a total of six different laboratories. In a ninth example, the initial test results were correct but a shipping error had resulted in the wastes being shipped to the wrong landfill site, contrary to the requirements in R.R.O. 1990, Regulation 347 – General – Waste Management under the *Environmental Protection Act (EPA)*.

The applicants also provided a copy of a letter dated June 20, 2006 from MOE confirming earlier statements that it is not planning to create a database to track laboratories that provide false results although it will continue to track and follow-up on non-compliance with Acts and regulations.

In a related *EBR* request, two other applicants requested that MOE amend Regulation 347 to require laboratories involved in sampling and testing wastes for specified parameters to be accredited and licensed. According to the applicants, the proposed amendment should require all landfill sites to test incoming waste materials, and until the landfill site accepts the results of the testing, incoming wastes to be kept separate from the rest of the wastes on the site and from incoming wastes from other sources. For additional information on this request, refer to section 5.2.12 of this Supplement (Application R2007014).

In both requests, the applicants noted that Fine Analysis Laboratories (FAL) had been charged in 2002 with falsifying certificates of analysis and that MOE had been unaware of any problems with FAL's test results until they were revealed by a former employee of the laboratory.

ECO Comment

The *EBR* requires that MOE make a decision whether or not to undertake a review within 60 days of receiving the application. Although the decision was due October 16, 2007, MOE still had not replied in April 2008. The ECO considers MOE's lack of action an abuse of the intent and purpose of the *EBR* of providing Ontarians with opportunities to better the environment in a timely manner, in addition to being out of compliance with section 70 of the *EBR*.

Review of Application R2007016, R2007017:

5.2.14 Review of the Need to Prescribe the *Energy Conservation Leadership Act*
(Review returned by MOE, undertaken by ENG)

Background/Summary of Issues

In autumn 2007, the ECO received an application on the theme of advancing energy conservation practices using Ontario's *Environmental Bill of Rights (EBR)*. The applicants requested a review of the need to prescribe the *Energy Conservation Leadership Act (ECLA)* under the *EBR* for various purposes, including reviews under Part IV of the *EBR*. The *ECLA*'s preamble states that the "Government of Ontario is committed to removing barriers to, and promoting opportunities for, energy conservation and to using energy efficiently in conducting its affairs." A provision of Part IV of the *EBR* enables "any two persons resident in Ontario who believe that a new policy, Act or regulation of Ontario should be made or passed in order to protect the environment may apply to the Environmental Commissioner for a review of the need for the new policy, Act or regulation by the appropriate minister." Without the *ECLA* being prescribed under the *EBR*, the ECO would not be able to formally receive, track, monitor and report on such specific requests made by residents.

One of the specific concerns of the applicants was that many Ontarians were not permitted to use the straightforward energy conservation measure of using a clothesline, as opposed to an electric or natural gas dryer, to dry their laundry. As of late 2007, the applicants noted that many homeowners in apartments, condominiums and residential developments in Ontario were prevented from doing so by restrictive covenants on their property. The applicants noted that if the Ontario government listed clotheslines as a good, service or technology under section 3(1) of the *ECLA*, all restrictive covenants preventing the use of clotheslines in Ontario would be rendered invalid. The applicants asserted that there were sound environmental reasons for removing this energy conservation barrier, e.g., the reduction of air pollutants. This was, however, just one example of the need for *EBR* powers to review actions taken by the Ministry of Energy (ENG) under the *ECLA*; other energy conservation measures and technologies could have far greater implications. Also, and more generally, the applicants were concerned about securing the public's *EBR* comment rights for any new policies or regulations under the *ECLA*, another feature that could be enabled by making the Act prescribed under the *EBR*.

Accordingly, the applicants requested that the Ministry of the Environment (MOE) review the need to have the *ECLA* prescribed under the *EBR*, as MOE is the ministry which administers O. Reg. 73/94 (the regulation identifies ministries and legislation which are *EBR*-prescribed). MOE was sent the application initially (as R2007016) and responded by returning the application and indicating that it required a request from ENG to prescribe the *ECLA* (this rendered application R2007016 inactive). Consequently, the ECO forwarded the application (as R2007017) to ENG for its consideration on October 22, 2007.

The applicants were represented by legal counsel at an environmental organization, who prepared and submitted this application on behalf of the applicants. The applicants and the environmental organization were interested in advancing their concerns publicly and for this reason, details about this matter appeared in the media over 2007/2008.

Ministry Response

ENG responded to the applicants on December 11, 2007 by agreeing to undertake the review. On January 21, 2008, ENG posted an information notice on the Registry to seek input from the public on a proposed regulation to address the specific matter raised by the applicants (removing restrictive covenants on residential clotheslines). The ministry also responded to the applicants on April 24, 2008 to notify them of further developments concerning prescribing *ECLA* under the *EBR* (see ECO Comment below).

ECO Comment

The ECO welcomes MOE's proposal to amend O. Reg. 73/94 to broaden the Acts and ministries covered by the *EBR*, including *ECLA* as requested by the applicants. MOE posted a proposal to do so after the end of our reporting year. The ECO will continue to track this proposal as well as ENG's conclusion of this application and report on these matters in forthcoming annual reports.

Review of Application R2007018:

5.2.15 Review of MOE Policies or Regulations under the *Safe Drinking Water Act*, 2002 as they Relate to Inorganic Fluorides in Drinking Water

(Review Accepted by MOE)

Background/Summary of Issues

In November 2007, two applicants requested that MOE review existing policies, regulation and standards (as well as the need for new regulations and policies) under the *Safe Drinking Water Act, 2002* (*SDWA*) as they relate to the addition of inorganic fluorides (and any other accompanying contaminants) to drinking water.

Although Japan, China, 98 per cent of Europe, and some Ontario cities (e.g., Welland, Thorold and Dryden) have banned or stopped adding fluoride to drinking water, several municipalities in Ontario continue this practice. Most fluoridated communities in Ontario add hydrofluorosilicic acid (an inorganic fluoride) to their drinking water. The applicants assert that the "additions of toxic inorganic [vs. organic] fluorides…with its accompanying contaminants such as inorganic arsenic and lead into our drinking water" have:

- resulted in increased contamination of groundwater, surface water and sewage effluent to water bodies and natural environments;
- caused significant harm to water bodies, ground water sources and the life therein; and,
- caused harm to the health of certain subsets of the population, including babies, pregnant women, fetuses and the elderly.

Ministry Response

MOE agreed to undertake this review in February 2008. The ministry indicated that Health Canada, as secretariat to the Federal-Provincial-Territorial Committee on Drinking Water (CDW), is revising the technical support document for the Canadian Drinking Water Quality Guideline for fluoride and is expected to conduct a national consultation within the next two years. MOE stated that the Government of Ontario participates on the CDW and will consider the applicants' comments before undertaking a provincial consultation via the Environmental Registry. This provincial consultation will coincide with Health Canada's national consultation. The ministry stated that comments received through the provincial public consultation, as well as material provided in the application, will be considered in setting new policies regarding fluoride in drinking water.

ECO Comment

The ECO will review the handling of this application once the ministry has completed its review.

Review of Application R2007025:

5.2.16 Review of Two Certificates of Approval (Air): Hamilton Steel Fabricator (Review Accepted by MOE)

Background/Summary of Issues

On February 4, 2008, an application for review was received from two Ontario residents requesting a review of two Certificates of Approval (Cs of A) for air emissions issued to a Hamilton steel fabricating company. The applicants expressed concern about emissions from the site affecting local air opacity and said that requirements for containment and control should be at least as stringent as for another facility under a ministry C of A which they cited.

The ECO forwarded the application to MOE.

Ministry Response

On May 15, 2008, MOE replied to the applicants, agreeing to a review of the facility's C of A. In the response, the ministry indicated that the review would be completed by November 12, 2008 and that the applicants would receive a summary of the results within 30 days of the completion of that review.

ECO Comment

The ECO will review the outcome of this review in our 2008-2009 Annual Report.

Review of Application R2007026:

5.2.17 Review of Certificate of Approval for a Private Sewage Treatment Plant (Review Denied by MOE)

Background/Summary of Issues

On February 6, 2008, an application for review was filed that alleged that: there was no public consultation on the sewage treatment plant (STP); the Certificate of Approval (C of A) was issued in violation of Procedure D-5-2 of the *Ontario Water Resources Act*; the classification used for the instrument was incorrect; the lack of consultation with the Department of Fisheries and Oceans resulted in a violation of the *Fisheries Act*; there was no environmental impact study conducted for the subdivision; the application for the STP was not approved by a designated municipal authority; it has not been shown that there will be no negative impact on a wetland or watercourse; and, public interest is 'high' rather than 'low to moderate'.

The ECO forwarded the application to MOE.

Ministry Response

On April 14, 2008, MOE denied this application for review because the ministry's analysis found that public consultation did occur as part of approval for the development under the *Planning Act*. This ministry also noted that the application for, and decision on the C of A were posted on the Registry. The ministry has also found that the subdivision agreement between the developer and the municipality satisfied several of the requirements of Procedure D-5-2.

ECO Comment

The ECO will review the handling of this application in the 2008-2009 Annual Report.

Review of Applications R2007027, R2007028, and R2007029:

5.2.18 Regulatory and Policy Reform Related to the Formation, Mobilization, Bioaccumulation and Biomagnification of Methylmercury in Ontario's Boreal Forest

(Review Denied by MOE, MNR and MNDM)

Background/Summary of Issues

In February 2008, an application was filed requesting that MOE, MNR and MNDM, in consultation with ministries such as the Ministry of Health and Long-Term Care and the Ministry of Aboriginal Affairs, undertake a review of the need for regulatory and policy reform related to the formation, mobilization, bioaccumulation and biomagnification of methylmercury in the boreal forest of northern Ontario. Methylmercury is a neurotoxin that is easily absorbed into the tissues of aquatic organisms but is not readily eliminated, thereby resulting in its bioaccumulation and subsequent biomagnification within food chains. It is highly toxic to mammals and can cause a number of adverse effects in humans, including birth defects, tremors, cerebral palsy and death. The applicants believe that the government's "current regulatory regime has been inadequate to prevent the contamination and mobilization of mercury in the boreal forest and to prevent the significant associated health and environmental risks associated with the bioaccumulation of methylmercury in fish."

The ECO forwarded this application to MOE, MNR and MNDM.

Ministry Responses

Ministry of the Environment:
On April 28, 2008, MOE denied the application for review. To comply with the requirements of the *EBR*, MOE should have provided a response to the applicants by April 15, 2008.

Ministry of Natural Resources:
On May 15, 2008, MNR denied the application for review. To comply with the requirements of the *EBR*, MNR should have provided a response to the applicants by April 15, 2008.

Ministry of Northern Development and Mines:
On May 20, 2008, MNDM denied the application for review. To comply with the requirements of the *EBR*, MNDM should have provided a response to the applicants by April 15, 2008.

ECO Comment

Since the ECO did not receive responses from MOE, MNR, or MNDM on this application by the close of the reporting year, (e.g., March 31, 2008), the ECO will review the handling of this application in our 2008-2009 Annual Report.

Review of Application R2007031:

5.2.19 Need for Regulation of Vapour Standards for Indoor Air (Review Denied by MOE)

Background/Summary of Issues

On February 29, 2008, the ECO received an application requesting a review of the need for a new regulation under the *Environmental Protection Act* to establish standards for residential indoor air quality related to vapour intrusion (e.g., movement of gases into buildings) from contaminants in soil or groundwater. The applicants also requested a review of the need for a guidance document, made under the regulation, pertaining to vapour intrusion. The applicants believe that a regulation and guideline are needed to provide direction to persons who are responsible for migrating contaminants, particularly trichloroethylene (TCE), in order to protect the health, welfare and rights of all Ontarians from adverse impacts resulting from vapour intrusion to residential and other structures.

The ECO forwarded the application to MOE.

Ministry Response

On May 1, 2008, MOE denied this application for review on the basis that the ministry is already in the process of undertaking a similar review that will address many of the concerns raised in the application. MOE also stated that it is in the process of developing a vapour intrusion guidance document.

ECO Comment

The ECO will review the handling of this application in the 2008-2009 Annual Report.

Review of Application R2007032:

5.2.20 Review of Certificate of Approval for Industrial Sewage (Response from MOE Pending)

Background/Summary of Issues

On March 6, 2008, an application for review was filed that alleged that the Certificate of Approval (C of A) for an agricultural pesticides mixing/formulating and packaging facility in Dundas, Ontario, was granted on the premise that the facility is a manufacturer of garden chemicals. The applicants alleged that the facility produces highly toxic chemicals that would not be used in garden applications. In July 2007, a major fire occurred at the facility and the applicants alleged that water used to extinguish the fire became contaminated with toxic chemicals and subsequently thousands of fish were killed in nearby Spencer Creek and Cootes Paradise Marsh.

The ECO forwarded the application to MOE.

Ministry Response

On March 26, 2008, MOE notified the applicants that they would be sent a notice of MOE's decision as to whether a review will be conducted by May 27, 2008.

ECO Comment

The ECO will review the handling of this application in the 2008-2009 Annual Report.

Review of Application R2007033:

5.2.21 Review of Guideline NPC-232 (Noise) (Response from MOE Pending)

Background/Summary of Issues

On March 25, 2008, an application for review was received, requesting a review of the MOE noise guideline NPC-232. The applicants are rural residents who are concerned with the proliferation of wind turbines and associated transformer stations in their area. They assert that the existing guideline is inappropriate for use in rural areas and does not adequately address the background "hum" tonality of transformers.

The ECO forwarded the application to MOE.

Ministry Response

On April 11, 2008, MOE notified the applicants that they would be sent a notice of MOE's decision as to whether a review will be conducted by June 10, 2008.

ECO Comment

The ECO will review the handling of this application in our 2008-2009 Annual Report.

5.3 Ministry of Municipal Affairs and Housing

Review of Applications R2006031 and R200632:

5.3.1 Processing Applications for Pits and Quarries under the *Planning Act* (Review denied by MMAH, MNR)

Geographic area: Hamilton and province-wide

Background/Summary of Issues

On February 26, 2007, an application for review was filed asking for a new mechanism for screening and evaluating applications for aggregate operations under the *Planning Act (PA)* and the *Aggregate Resources Act (ARA)*. To illustrate the need for the mechanism, the applicants described their concerns about a proposed quarry in the former Town of Flamborough (now part of the City of Hamilton). According to the applicants, the site of the proposed quarry has several significant natural features and designations that make it an unsuitable choice for large scale industrial extraction. They felt quarrying at this site is incompatible with existing municipal plans and approved developments, in part because of proximity to residential developments. They are also concerned about the potential impacts of the quarry on groundwater quality and quantity, since the site includes the recharge area for local municipal wellheads. The ECO forwarded the application to both MMAH and MNR.

Detailed Background:
The applicants stated that the review process for aggregate proposals, as it exists in Ontario, does not serve the environment well and is counter to participatory democracy given the investment of time, human and financial resources required for residents of Ontario. This, they contended, despite reforms to various aspects of Ontario's land use planning system in the past few years.

Specifically, they highlighted the application review processes for Class II proposals under the *Aggregate Resources Act*, and for Official Plan Amendments under the *Planning Act*. These processes, they noted, can run for years and be very complicated, especially in the case where the processes are conducted in combination. The applicants noted that *ARA* and *PA* processes can be subject to additional years of procedure by virtue of appeals to the Ontario Municipal Board, the Environmental Review Tribunal, or the Consolidated Hearings Board (CHB) . Some aggregate proposals can be subject to further appeal, such as to a court or Provincial Cabinet. As example, the applicants cited several lengthy approval processes in the vicinity of the Flamborough proposal. The applicants contend that Ontario's land development processes seem to include an inherent presumption that development will proceed at the end of the process and applications can simply be amended until they gain approval.

The applicants suggested that a pre-screening of proposed aggregate sites could address their concerns. The screening would primarily identify sites with clear "failure attributes", for example those having significant natural or cultural features or designations which would be damaged or destroyed, or no longer be compatible with a site which underwent major development. Proposals that passed the screening, or those with few lingering uncertainties would proceed to the next stage, i.e., the existing approvals system. However, the applicants cautioned that the granting of authority to move to the second stage of approvals should not lead to a presumption by the proponent, government or citizens that the proposal will necessarily proceed to approval. Some proposals might still be rejected or withdrawn in the second stage, based on more detailed review.

Details and Concerns about Proposed Quarry near Flamborough
The applicants' participation in the review of this particular proposal helped to inform their view of the need for a front-end screening mechanism for aggregate proposals.

Details about Proposed Quarry near Flamborough, Ontario
The applicants provided some detail about the magnitude and operating parameters of a specific quarry proposal near Flamborough. If approved, this quarry:

- would be initially 380 acres in size:
- may be expanded by 150 acres in the future
- could produce 3 million tonnes of aggregate per year;
- could become the eighth largest aggregate operation in Canada;
- could be active for approximately 30 years;
- could eventually have a depth of 40 metres;
- would generate hundreds of truck trips on each of its 200 operating days per year.

Concerns about Flamborough Proposal:

1) Groundwater and Drinking Water Impacts. The applicants provided a detailed account of how the quarry, if approved, would potentially impact the local area's water supply. Groundwater is the only local source of drinking water. The quarry's de-watering activities could have a direct and potentially negative impact on local water quality and quantity. The applicants felt that the quarry's dewatering activity conflicts with one of the purposes of the *Clean Water Act*, that is the

protection of aquifer recharge areas. The quarry's close proximity to the water wells of the community of Carlisle was cited as a concern.

2) Impacts on Natural Features. The applicants cited a number of provincial natural heritage features and designations that should have a significant bearing on the quarry site proposal. They felt these ought to be factored into their proposed screening mechanism. The applicants listed these: that the site lies within the Natural Heritage System of the Greenbelt Plan; that the site contains provincially significant wetland complexes, significant woodlands and water resources which they felt deserve protection under the Greenbelt Plan; the site and/or vicinity, they believe, may contain species at risk; the site is in close proximity to a designated Area of Natural and Scientific Interest (ANSI); and that the proposed quarry would remove hundreds of acres of farmland from production, despite the Greenbelt Plan's stated priority to protect agricultural land.

3) Proposal's Incompatibility with Local Land Use. The applicants noted that the land use in the vicinity of the proposed quarry is zoned primarily as "rural settlement area." According to the Official Plan of the City of Hamilton, the site itself is designated "Rural" and it is zoned "Agriculture" and "Conservation Management." Two schools and a child care facility are located one concession road to the south of the proposed site. The applicants noted the lack of truck haul routes in the area. Roads in the area currently lack shoulders, have numerous grade changes, and are not designed for heavy volumes or loads. The former Town of Flamborough had affirmed that rural areas should be predominately agricultural in nature and the City of Hamilton confirmed that agriculture is a strategic priority for the municipality. The former town's official plan also included a list of criteria that would be used to evaluate an application to change the zoning of a parcel of land to "Industrial Extractive." The list included items such as: compatibility with existing and planned uses; and the potential impacts on the environment and transportation system.

Finally, the applicants also provided a listing of the activities that a local citizen's group has undertaken to express concern over quarry proposals. The listing was intended to illuminate the lengthy, costly and time-consuming ordeal which citizens may face when trying to highlight the local detrimental impacts of such a large-scale industrial development.

Ministry Response

Ministry of Municipal Affairs and Housing:
On May 2, 2007, MMAH denied this application for review on the basis that the ministry had recently made extensive changes to the *Planning Act* and Provincial Policy Statement (PPS). MMAH said that (zoning) application processes have been improved to allow municipalities to require pre-consultation. The ministry went into great detail about how it consulted on, and how it made changes to the *Planning Act*. The ministry's response centred more on the fact that the *PA* and PPS had recently been amended, than on how the applicants' concerns could be effectively addressed through Ontario's land use planning system. Given that the *Planning Act* was amended just a year prior to this application, the ministry is not obliged under the *EBR* to review matters related to such recently finalized decisions (provided the amendments were subject to appropriate consultation). Some of the planning changes that MMAH highlighted might assist, to some degree, in a situation like that raised by the applicants if it were to occur again in the future. For example, MMAH noted that the process has been improved to facilitate upfront discussions between applicants and a municipality before an applicant makes a submission. The ministry feels this will promote early identification of problems and lead to more effective decision-making.

Ministry of Natural Resources:
On May 3, 2007, MNR denied this application for review. MNR manages natural resources in Ontario and administers the *Aggregate Resources Act*, consequently the ministry's response was very detailed. MNR responded by expanding on various aspects of its mandate, decision-making and how its public participation processes relate to those of the *Environmental Bill of Rights*. MNR also summarized its decision in the form of key considerations in support of its decision, including:

- The *ARA* provides a fair and set process for applicants, stakeholders and the wider public to participate and express their interests in the review process. This meets the principle of giving people a voice in decisions affecting their lives, as detailed in MNR's Statement of Environmental Values (SEVs).
- Environmental protection is afforded by the existing *ARA* framework; in particular there are up-front mandatory requirements for technical reports prepared by qualified individuals and reviewed by mandated agencies.
- MNR noted the following practices as being in accordance with its SEV: the protection of mineral aggregate resources for long-term use through land use planning; minimizing social and environmental impacts of aggregate extraction through land use planning; and the administration of the *ARA*.
- The *ARA*, in requiring lands to be zoned for mineral aggregate extraction prior to the granting of a licence, ensures that land use planning processes are respected.
- MNR undertakes program reviews periodically, which can bring about legislative and process improvements.

MNR provided greater detail on some of these points.

MNR noted that there are set notification and public participation requirements under the *ARA*. The *ARA* requires aggregate licence applications to undergo a comprehensive process of review in order to anticipate and prevent negative environmental impacts. An integral component in any review is public and agency participation in the decision process. This process, along with Environmental Registry posting requirements and any associated *Planning Act* process ensures that all people affected are treated fairly in terms of opportunities to have a voice in the licensing decision. Applicants and those concerned about a proposal should have equal opportunities to have their interests considered and the current processes allow this.

If a member of the public objects to a proposal, that person must file a letter of objection with MNR and the applicant within the 45 days of comment provided by the *ARA*. If there are outstanding objections that cannot be resolved by the applicant, the *ARA* application may be referred to an OMB hearing. Objectors can then raise their issues directly with the OMB.

MNR also described the process of licence issue or refusal. If the *ARA* application is not referred to the OMB for a hearing and the appropriate zoning is in place, the minister may decide whether to issue or refuse to issue the licence. A Minister's refusal to issue a licence is appealable by the applicant to the OMB. MNR noted that some *ARA* licence decisions can be appealed by a 3rd party under the *EBR*; (in practice, only a very small number of *ARA* licence decisions made by MNR since 2007 have been appealable in this way). MNR noted that interested persons can consult the appeal rights description in the decision notice relating to an *ARA* licence or application posted on the Environmental Registry.

The ministry outlined the technical reports which may be required as part of a licence application. These include reports describing the effect of a pit or quarry proposal on site and vicinity hydrogeology, the natural environment, cultural heritage resources, the noise environment and a report on blast design, if blasting will occur at the site (the last two reports are required if a sensitive receptor is in close proximity to extraction activities).

Finally, MNR stated that screening out applications before they enter the existing processes would prevent all parties from participating. As well, the ministry maintains that the potential for harm to the environment would not be lessened if a pre-screening mechanism was established.

ECO Comment

The ECO disagrees with the ministries' denial of this application and believes that MNR or MMAH should be seriously considering the concept of a pre-screening mechanism for aggregate proposals. MNR's authority for its aggregate resources mandate derives in part from the Provincial Policy Statement, 2005 and includes: protecting sources of aggregate and ensuring their availability in close proximity to markets. These principles are to be applied by all planning authorities to ensure development in Ontario is consistent with the PPS. Furthermore, despite MMAH's recent reforms to planning in Ontario, municipalities and residents still face remarkable obstacles when they seek to significantly influence decisions made through application processes under the *ARA* or *PA*. Under the status quo set of policies, most applications for aggregate extraction will proceed towards approval, sooner or later. Getting to "no" is rarely an option.

MNR provided a more detailed response to the applicants than MMAH did, but its response provides very little in the way of measures that could help address the applicants' concerns. Both ministries noted that many of the Acts, regulations and policies governing land use planning and aggregate licensing are subject to periodic review and public input.

The ECO has identified that key problems with aggregate licensing and extraction persist despite recent improvements in land use planning law in Ontario:

A Pre-determined Outcome:
The ECO agrees with the applicants that the process of licensing of aggregate extraction sites in Ontario is one in which most proposed developments are likely to proceed, perhaps with modification and enhancements, while few will be refused. Indeed, it is rare for the MNR, the OMB and other tribunals to refuse to grant the requisite approvals to site owners, despite an often flawed and piecemealed process. And, a site's environmental features or existing zoning may be given a great deal of consideration during the review and adoption of mitigation measures for a proposed quarry. But, those attributes alone are not likely to result in a decision to refuse a licence.

MNR's brief description of the aggregate application review process indicates that public comments are welcomed, and efforts will be made by the proponent to address the comments. It does not include a step involving the potential determination, at an early stage, that some proposed sites have features and attributes sufficient to warrant a no-development option. It does not indicate that there are clear environmental triggers for refusing to let an application proceed through the process. On this point MNR contends that screening out applications before they enter the existing process would prevent all parties from participating.

Natural Features Destruction:
MNR concluded that there is no potential harm to the environment if this review for the need of an early screening mechanism is not undertaken. The ECO disagrees. The applicants' suggestion of a screening mechanism was intended to allow for the identification of sites with significant environmental attributes, potentially resulting in the withdrawal of an extraction proposal at such sites. This type of screening at present does not exist, therefore the environmental attributes, at sites which proceed to development, are either greatly disturbed or lost. Even within designated land use areas in Ontario, such as the areas of the Niagara Escarpment Plan, Oak Ridges Moraine Conservation Plan, and Greenbelt Plan, very little is considered "off-limits." These plans exclude pit and quarry activity only from the most protected features within each plan area. Many aggregate extraction sites are being licensed or expanding within these plan areas. The ECO does agree with MNR that the *ARA* framework provides for environmental protection measures to be incorporated into aggregate extraction sites, but mostly in the form of mitigating the damage to the environment during and after site development.

Public Participation Hurdles:
The ECO agrees that the *ARA* and *PA* review processes provide opportunities for residents to participate. However, the difficulties that many residents face can seriously limit their interest in participating. For example, if neighbours or persons with concerns would like to see a site significantly scaled back in size or operation, then they will most likely need to formally express their objection to the proposal and will likely need to participate in an OMB Hearing. Such a hearing can be intimidating, costly and time consuming for the residents, as they will probably need legal or expert counsel, preparation time and leave time from their employment to participate. Any adverse result at a hearing could be a major, costly and longstanding setback for any residents trying to advance natural heritage protection in the future.

Demand Management/need for Conservation Strategy:
Ontario's per capita consumption of aggregates is very high; an estimated 14 tonnes per person, per year. In contrast, the overall consumption rate in the United Kingdom is only about five tonnes per person per year. Many factors clearly contribute to the U.K.'s lower consumption rates, but significant elements likely include the U.K.'s much higher costs for aggregate, and "lean construction practices", such as innovative road construction design. The ECO recommended in 2003 that MNR develop an aggregates conservation strategy, to identify ways to better manage our demand for this vital resource. While MNR has stated that it is committed to "contributing to" an aggregate resources strategy with the Ministry of Public Infrastructure Renewal, the progress of these ministries to-date has been minimal.

Lack of an Early Screening Mechanism:
The ECO reiterates our support for a screening mechanism, first expressed in our 2006-2007 Annual Report: "the ECO recommends that the provincial government reconcile its conflicting priorities between aggregate extraction and environmental protection. Specifically, the province should develop a new mechanism within the *ARA* approvals process that screens out, at an early stage, proposals conflicting with identified natural heritage or source water protection values."

For MNR's responses to the recommendation above and another on the rehabilitation of pits and quarries see the Ministry Progress section of this year's Annual Report. See also pages 44-49 of our 2006-2007 Annual Report for additional commentary on some of the issues raised in this application.

Review of Applications R2007005 and R2007006:

5.3.2 Review of the Need for an Act to Protect Cyclists and Improve Urban Air Quality (Review Denied by MMAH; application returned by MOE)

Background/Summary of Issues

The applicants requested that the Ministry of the Environment (MOE) and the Ministry of Municipal Affairs and Housing (MMAH) review the need for new legislation or amendments to the Provincial Policy Statement, 2005 (PPS, 2005) under the *Planning Act* for the protection of bicycle couriers and cyclists in general. The reasons for requesting this review were multiple:

- the applicants contended that cyclists' civil rights of mobility, safety and health have been compromised and overlooked. They argued that all levels of government are responsible for the due care and protection of residents' right to security and right to life. They noted that the lack of the implementation of cycling transportation plans has contributed to thousands of bicycle collisions in the past decade. The applicants pointed to the Toronto Regional Coroner's Report, 1997 and the Toronto Bicycle/Motor-Vehicle Collision Study, 2003 to document the city's unsafe road environment and inadequate cycling infrastructure;
- the applicants noted that the lack of an environmentally sustainable transportation system has a pronounced effect on cyclists' health; cyclists are often required to travel in close proximity to automobiles and their emissions. This exacerbates respiratory problems and migraine headaches; consequently, the road network can be considered an unhealthy work environment for bicycle couriers;
- the applicants also contended that a disproportionate amount of land is allocated to roads and motor vehicles in the City of Toronto and suggested that this has contributed to extensive air pollution, environmental degradation, and socio-economic hardship to low income residents. As a result, they felt that social equity has been jeopardized;

- furthermore, the applicants contended that since the City of Toronto promotes cycling, the city should be held accountable for the installation (or lack of) of cycling infrastructure which would create a safe and healthy environment.

The applicants focused on two objectives in their application:

- that municipal governments install bicycle lanes on all existing municipal and new roads beginning in the budget year 2007/2008; and,
- that a new provincial law be passed, under MMAH jurisdiction, to enhance safety and reform the system of tort liability, and particularly the mechanism known as "contributory negligence." See box below.

One means to remedy this situation, according to the applicants would be to impose liability on municipalities since they are partly at fault for the damages or suffering of cyclists involved in a collision with a motor vehicle, for not providing reasonably safe cycling conditions.

Tort Liability and Contributory Negligence

A "tort" is a civil wrongdoing, other than breach of contract, such as damage to property or injury from an accident, and for which a court could award financial compensation. Liability in this instance refers to being responsible, answerable, or at-fault for the wrongful act in whole or in part. Contributory negligence is the means of apportioning fault or blame between the plaintiff and the defendant. Under current Canadian laws, if a cyclist is involved in an accident and is partially at fault, the cyclist could be awarded compensation, but only to the extent of the other party's fault. This "ratio of fault" (i.e., contributory negligence) is usually determined by a judge in a court of law. If a cyclist is found to be primarily at fault in an accident with a motor vehicle, the cyclist could face financial hardship since many cyclists are not insured against personal injury while operating their vehicle in the same way as an operator of a motor vehicle.

Ministry Response

Ministry of the Environment (MOE):
MOE returned this application to the ECO, but without denying it. The ministry indicated that upon review of the application, its subject matter was not within the mandate of the ministry.

Ministry of Municipal Affairs and Housing (MMAH):
MMAH reviewed this application and denied it. Before doing so, the ministry described the application as having three parts, covering issues related to:

(1) the Provincial Policy Statement, 2005;
(2) the installation of bicycle lanes; and
(3) tort liability.

The ministry scoped its consideration by addressing only issues about the Provincial Policy Statement, 2005 (PPS, 2005). It deemed the other issues to be outside its mandate, although it did also address the issue of bicycle lanes in its response to the applicants, thereby responding in part to the second group of issues. With regard to the PPS, 2005 MMAH indicated that:

"The PPS, 2005 provides strong policy direction for the provision and promotion of safe and energy efficient transportation systems including cycling lanes and other non-motorized movement as well as efficient land use patterns that support alternative modes of transportation. MMAH referred the applicants to these sections of the PPS:

- Policy 1.5.1 (a). Healthy, active communities should be promoted by planning public streets, spaces and facilities to be safe, meet the needs of pedestrians, and facilitate pedestrian and non-motorized movement, including but not limited to, walking and cycling.
- Policy 1.6.5.1. Transportation systems should be provided which are safe, energy efficient, facilitate the movement of people and goods and are appropriate to address projected needs.
- Policy 1.1.1(c). Safe communities are sustained by avoiding development and land use patterns which may cause environmental or public health concerns.
- Policy 1.6.5.4. A land use pattern, density and mix of uses should be promoted that minimizes the length and number of vehicle trips and support the development of viable choices and plans for the public transit and other alternative transportation modes."

The ministry also noted that creating and regulating cycling lanes is a municipal matter as it relates to a number of different issues such as land use and municipal roads, which it contends are controlled locally. MMAH wrote that this stems from authority granted to municipalities through the *Municipal Act, 2001*

The ministry's response also described the consultation opportunities over the period 2001-2004 when MMAH was preparing to amend and update the previous PPS released in 1996. MMAH informed the applicants that the *Planning Act* requires that a review of the most recent PPS be commenced for the purpose of determining the need for its revision within five years from the date that it was issued.

ECO Comment

The overall safety of Ontario's road network for cyclists is an important matter for human health and environmental sustainability. It is also an issue of great concern in the areas of legal liability, compensation and insurance.

Human Health Implications:
While cycling can be a healthy form of exercise, the activity can also be hazardous since cyclists are usually required to interact closely with motor vehicles in most urban settings. When collisions occur, the cyclist is far more likely to be injured, and to a greater severity than the driver. Roughly 2,400 cyclists are injured and 10 to 15 killed each year in Ontario, by way of collisions between bicycles and motor vehicles or streetcars (these are reported figures; the collision rate could be higher as many smaller incidents likely go unreported).

As for the health hazard posed by being exposed to vehicle exhaust and poor air quality, all users (drivers, cyclists or pedestrians) of busy city streets are exposed to contaminated air. Studies have shown that drivers and passengers of motor vehicles are exposed to contaminated air similar to any other street user. But, cyclists, pedestrians and joggers may be more affected because of their generally elevated respiratory rates and with couriers, their long exposure time (virtually all day). These factors almost certainly ensure that couriers and certain other groups would be breathing in a greater quantity of contaminants on a daily basis than motor vehicle-based road users.

Environmental Implications:
The environmental benefits of cycling are quite clear. It is a nearly emission-free mode of transportation that is optimal for short trips in most Canadian cities for between 6-10 months of the year. A bicycle's land use requirements are minimal compared to an automobile or truck. Furthermore, the business of bicycle couriering or delivery represents a good example of an environmentally sustainable economic activity at a time when many sectors and governments are grappling with how to implement sustainable development.

While a few individual policies in the PPS, 2005 are supportive of environmentally sustainable urban design (e.g., improved cycling and walking routes), there are also many PPS, 2005 policies and other Ontario government policies that support or result in business-as-usual types of road-centred urban development. In our 2004-2005 Annual Report, we wrote:

> *"The Ministry also clearly states that there is "no implied priority" in the order in which the topic areas appear within the PPS. However, it is evident that some land uses are given clear priority over*

> *others. The 2005, PPS and the various laws that shape how it is implemented unequivocally establish priorities. Environmental planning and protection…are not given the same importance as economic drivers. This fact is not new, but, rather, indicates that minimal progress has been made."*

The ECO has observed that the focus of transportation planning in Ontario has traditionally been the expansion of the road network primarily for motor vehicles. Typically in provincial budgets, more transportation funding is dedicated to road expansion, upgrade or maintenance than to any other mode of travel (e.g., transit, cycling, or rail). Funding for cycling infrastructure in Ontario would constitute only a very small fraction of the provincial or any given municipal road program. The PPS, 2005 uses the term 'transportation corridor' as if to suggest multiple modes of travel could be accommodated by the features. The identification of a transportation corridor in Ontario typically results in roads for motor vehicles; rail, transit and cycling are rarely ever the focus of planning such corridors.

Furthermore, the PPS, 2005 statement that streets *should be* planned to meet the needs of cyclists does not *require* municipalities to provide safer cycling networks (i.e., an extensive network of cycling lanes segregated from motor vehicles by curbs or exclusive paths allowing movement throughout most parts of a given city). Most of the decision-making about cycling infrastructure is at the discretion of municipalities. Most Ontario municipalities have done little more than paint white lines on existing streets and install cycling symbols. Many European cities, as well as Montreal have separately-curbed lanes for cyclists. Some Ontario cities like Ottawa and Toronto have at least some bicycle paths separated from traffic.

Tort Law and Contributory Negligence:
Tort liability, and particularly contributory negligence are issues that all road users should be concerned about, especially cyclists, yet many are likely only vaguely familiar with the terms, unless they have been involved a collision where fault needed to be determined. Couriers in at-fault accidents with a motor vehicle could lose their livelihood and find themselves financially desperate unless they work for a company with a comprehensive insurance plan. Since so many municipal roads are missing safety provisions like bicycle lanes, the applicants suggested that municipalities ought to be identified as a contributor to negligence when bicycle-motor vehicle collisions occur.

By suggesting the reform of the system of tort liability and contributory negligence with particular reference to municipalities, the applicants might have been seeking a way to achieve two things. One, if a cyclist or courier was injured, the municipality could be identified as a party to assign some degree of fault and from which to seek compensation, if the injury took place in an unsafe cycling environment. Secondly, the understanding by municipalities that this liability exists would likely be sufficient incentive for municipalities to begin allocating appropriate amounts of road space to cyclists and installing protections to increase the safety of cyclists on city streets. Changes to Ontario's system of tort liability would require legislative changes, initiated by a ministry such as the Attorney General of Ontario. Since the Attorney General is not prescribed under the *EBR*, the applicants would have to address their concern about tort liability reform directly to the Attorney General.

The ECO believes that MMAH had grounds for denying this application, notably that the PPS, 2005 was the subject of review and public consultation within the last five years (the *EBR* permits ministers to deny requests for the review of decisions made within five years of the date of an application calling for the review of such a decision). As well, the system of tort liability is outside the mandate of that ministry. MMAH could however consider providing best practice guidance to municipalities concerning cycling infrastructure. As for MOE, it was justified in returning this application since the subject matter was not within its mandate. Nevertheless, the applicants make a good point that cycling infrastructure remains inadequate in many Ontario municipalities, including Toronto. The ECO encourages MMAH and MOE to work together on the issue of improving urban air quality and the safety of cyclists and bicycle routes.

Review of Application R2007007, R2007008, R2007009:

The Need for Municipal Climate Change Adaptation Strategies (Review Denied by MNR, MMAH, undertaken by MOE)

This application was reviewed in conjunction with R2007007 (MNR) and R2007009 (MOE). Please see section 5.4.4 under the Ministry of Natural Resources for the full review.

Review of Applications R2007010, R2007011, and R2007012:

5.3.3 Review of the Need to Protect the Paris Galt Moraine (Review Denied by MMAH & MNR, Undertaken by MOE)

Background/Summary of Issues

In May 2007, an *EBR* application was submitted that requested a review of the need for a new policy or statute to protect the Paris Galt Moraine and its function as a groundwater recharge area in the Grand River watershed. This *EBR* application was forwarded to the Ministry of the Environment (MOE), the Ministry of Natural Resources (MNR), and the Ministry of Municipal Affairs and Housing (MMAH). The ECO notes that it was unable to forward this application to the Ministry of Public Infrastructure Renewal (PIR) as it is not prescribed under the *EBR*. PIR is responsible for regional growth plans under the *Place to Grow Act*, which directly impact upon the protection of groundwater recharge areas.

The applicants were the Mayor of Guelph and the Member of Provincial Parliament for Guelph-Wellington. A variety of documentation was submitted along with this *EBR* application. Among this material was a Private Member's Motion introduced by the Member of Provincial Parliament for Guelph-Wellington and passed by the Ontario legislature in December 2004:

> "In the opinion of this House, the Government of Ontario should identify and protect moraines, watersheds and headwater areas, beyond the Greenbelt study area initially identified by the Province, in which urban development would have a significant negative impact on groundwater supplies."

The applicants stated that municipalities within the Grand River watershed, such as Guelph, Cambridge, Kitchener, and Waterloo, are largely dependent on groundwater resources to supply their municipal drinking water. The applicants also noted that these four municipalities are all designated as growth areas in the Growth Plan for the Greater Golden Horseshoe under the *Places to Grow Act*. The applicants stated that it is critical to protect the Paris Galt Moraine as a groundwater recharge area as "growth areas will shortly encroach into the moraine." The applicants also stated that "provincial policy leadership is required in analyzing the extent to which the cumulative effect of aggregate extraction negatively impacts groundwater recharge in the moraine areas."

The applicants stated the "inter-jurisdictional complexity of protecting the Paris Galt Moraine warrants provincial leadership in protection policy." Due to the geographic size of this system of moraines, the applicants stated that the area requiring protection is more extensive than the municipal source water protection areas as contemplated in the *Clean Water Act*. The Paris Galt Moraine extends over parts of Peel Region, Halton Region, Wellington County, the City of Guelph, the City of Hamilton, the Region of Waterloo, and Brant County. Four different conservation authorities – the Grand River Conservation Authority, Credit Valley Conservation, Conservation Halton, and the Hamilton Conservation Authority – also have sections of this system of moraines within their boundaries.

The Geographic Scope of the Paris Galt Moraine:
According to MNR, the geological feature described as the Paris Galt Moraine extends approximately from the towns of Dehli and Simcoe in the southwest to the village of Erin in the northeast. This belt of moraines is approximately 6.4 to 8 km wide, featuring eskers and drumlins, as well as hummocky topography and outwash gravel. Part of the northeastern section of the moraines lies within the Greenbelt Area, under the *Greenbelt Act*, and the entire moraine system is within the Greater Golden Horseshoe Growth Plan Area, under the *Places to Grow Act*. MNR states that there is a "slight correlation" between the Paris Galt Moraine and aggregate extraction areas.

The Paris Galt Moffat moraine complex contains an earth science area of natural and scientific interest (ANSI) that was originally identified by MNR in the late 1970s. The ministry stated at that time that the earth science values of this moraine complex warranted designation as an ANSI as this landform was viewed as provincially significant. However, according to MNR, the original delineation was to be interpreted as a preliminary marking of the boundaries pending further detailed study. Only a small portion of the total area that this moraine complex covers was formally identified as an ANSI by MNR in this initial mapping exercise.

In 2005, MNR began a process of dividing the existing Paris Galt Moffat Moraine ANSI into three separate, but smaller, ANSIs. The proposed Paris Moraine ANSI, the proposed Galt Moraine (at Corwhin) ANSI, and the proposed Moffat Moraine ANSI encompass three "core areas" of the moraines and some adjacent lands. MNR states that this new delineation is based on a "strictly scientific assessment" and, further, it notes that the moraine features "may be susceptible to irreversible impacts through aggregate extraction or urban development."

Land Use Planning and the Paris Galt Moraine:
The Official Plan of the County of Wellington generally zones the areas in and around the proposed Paris Moraine ANSI and the proposed Galt Moraine (at Corwhin) ANSI as secondary agricultural, greenlands, and core greenlands. These two proposed ANSIs are not zoned as a mineral aggregate area or as an urban centre, although sizeable residential development is adjacent to the proposed Paris Moraine ANSI within the boundaries of the City of Guelph.

The proposed Moffat Moraine ANSI is located in the Town of Milton, in the Region of Halton, and it is within the natural heritage system in the Greenbelt Plan area. The Region of Halton recognizes both the "Paris Moraine Complex" and the "Galt and Moffat Moraine" as Environmentally Sensitive Areas (ESAs). The Region of Halton describes both ESAs as likely being significant local groundwater recharge areas and that "any developments which require large scale regrading should be prevented."

The Township of Puslinch, within the County of Wellington, expressed opposition to MNR with regard to its proposal to remove the single large existing ANSI and to create three smaller new ones. Based on the advice of two separate environmental consulting firms, the Township of Puslinch was concerned that the new boundaries: no longer depict the linear nature of the moraine system; do not represent the diversity of the landscape or geology of the existing ANSI, thereby decreasing its scientific value; and, no longer represent the scale of the moraine, thereby diminishing its educational value.

MNR's delineation of ANSIs affects land use planning decisions which, in turn, are the overall responsibility of MMAH. The *Planning Act* requires that planning authorities, which includes both municipalities and the Ontario government, must make planning decisions which are "consistent with" the 2005 Provincial Policy Statement. The 2005 PPS states that "development" and "site alteration" shall not be permitted in ANSIs unless it has been demonstrated that there will be no "negative impacts" on the natural features or their "ecological functions." The 2005 PPS defines negative impacts as any "degradation that threatens the health and integrity of the natural features or ecological functions for which an area is identified due to single, multiple or successive development or site alteration activities." However, the 2005 PPS does not specifically restrict other land uses within ANSIs, such as "infrastructure" (e.g., roads, powerlines, etc.) or "mineral aggregate operations."

The 2005 PPS also states that planning authorities "shall protect, improve or restore the quality and quantity of water" and that "ground water features, hydrologic functions and natural heritage features and areas which are necessary for the ecological and hydrological integrity of the watershed" should be identified." Planning authorities are also directed to "protect all municipal drinking water supplies and designated vulnerable areas." Planning authorities are empowered to restrict "development" and "site alteration" in or near "sensitive ground water features such that these features and their related hydrologic functions will be protected, improved or restored."

Municipal Water Supply and the Paris Galt Moraine:
The City of Guelph, which is dependent on ground water for its supply of drinking water, currently is developing a Water Supply Master Plan in order to ensure adequate supplies to satisfy population growth projections over the next 50 years. As noted in the ECO's 2006-2007 Annual Report, a significant problem is that "provincial population growth projections for Guelph are greater than the projections in the municipality's Official Plan; the City is planning for a 1.5 per cent annual increase in population to the year 2027, while the province is projecting a 2.5 per cent annual increase over that same period." Municipal and provincial forecasts for population growth in Guelph for the year 2031 differ by almost 26,000 people.

To meet these increased demands for water supply, the Water Supply Master Plan outlines the possibility of new wells outside the boundaries of the City of Guelph. One of the identified alternatives is to take additional water from the Amabel aquifer, which is overlain by the Paris Galt Moraine. Additionally, the County of Wellington has completed a detailed Groundwater Protection Study in 2006 that led to proposed amendments to its Official Plan, specifically with regard to wellhead protection areas. The Groundwater Protection Study also recommended that development be prohibited "on the moraine system that would diminish recharge function and/or impair quality."

Ministry Response

Ministry of the Environment:
In July 2007, MOE agreed to undertake this *EBR* review and to provide a report within 18 months. However, the ministry stated that the *Clean Water Act* itself will not be part of this review. Further, MOE stated that this review will not affect current planning decisions and that all existing ministry policies will continue to apply during the review period. The ministry also stated that the 2005 PPS and the Greenbelt Plan would not be part of this review.

Ministry of Natural Resources:
In August 2007, MNR denied this *EBR* application. The ministry stated that the public interest does not warrant a review as MNR is not the lead ministry for drinking water protection; legislation and policies already exist that address land use planning and ground water resources; the ministry indirectly contributes to drinking water protection by identifying wetlands and other natural heritage values; environmental impacts of aggregate operations are minimized through its administration of the *Aggregate Resources Act*; and, provincial planning policies are regularly reviewed. The ministry stated that there is no potential of harm to the environment if the review was not undertaken.

MNR stated that its role is limited to providing technical advice to other ministries with respect to many of the issues raised by the applicants. The ministry stated that it provides assistance to MOE in delivering its source water protection program under the *Clean Water Act*, including working on the development of guidance for water budgets and risk assessment. MNR also provides advice to MMAH with regard to land use planning under the *Planning Act* and to PIR for its responsibilities related to the *Places to Grow Act*.

MNR stated that it is currently working with the Grand River Conservation Authority (GRCA) and the Ontario Sand, Stone and Gravel Association (OSSGA) to develop guidelines to assess the cumulative impacts of aggregate extraction on ground water resources. The ministry also has completed the first phase of a study, which is available on MNR's website, to examine the potential impacts of aggregate extraction on ground water and surface water. Among its many findings, the ministry's report notes that "areas where high quality aggregate resources exist will typically be areas of higher vulnerability to contamination from any land use, whether extraction occurs or not."

Ministry of Municipal Affairs and Housing:
In August 2007, MMAH denied this *EBR* application. The ministry stated that the public interest does not warrant a review "in light of the strong policy direction contained in the PPS, 2005 and Greenbelt Plan to protect both natural heritage features and water resources." MMAH stated that it would assist MOE in undertaking its review.

MMAH stated that the 2005 PPS already recognizes "the need to protect both sensitive and vulnerable surface and ground water features, while providing appropriate direction for municipalities to meet the range of land use needs of their communities. The PPS, 2005 recognizes this complex interaction and provides policy direction to achieve an appropriate balance between interests. This includes policy direction on the need for coordination among municipalities for such issues as managing and/or promoting growth and development, as well as managing natural heritage and water resources."

ECO Comment

The ECO commends MOE for undertaking this review. This application is similar to another *EBR* application that the ministry is undertaking related to the Waterloo Moraine. These *EBR* applications highlight several long-standing concerns of the ECO with Ontario's land use planning system.

The Ministry of Public Infrastructure Renewal (PIR) has the responsibility for overseeing a broad array of environmentally significant land use decisions and planning authorities must conform with the *Places to Grow Act*. For example, the environmental impact of the Growth Plan for the Greater Golden Horseshoe was a central concern of the applicants. However, PIR is not prescribed under the *EBR*. As such, Ontarians do not have *EBR* public consultation rights nor are the ministry's policy choices subject to the scrutiny of *EBR* applications for review.

The ECO disagrees with the decisions by both MMAH and MNR to not undertake this review. The ECO has long been concerned about the fact that natural heritage features and functions are not adequately protected by Ontario's land use planning system. These facets of land use planning are a joint responsibility of MMAH and MNR. The current land use planning system often gives priority to other land use interests, at the expense of natural areas and the province's biological diversity. In our 2004-2005 Annual Report, the ECO warned,

> "The entire planning system presupposes this growth and has been explicitly designed for it.... From an ecological or sustainability perspective, this planning approach will fail in the long term. Few of the critical elements of the natural environment – significant woodlands, wetlands, valleylands, species, sensitive water features – are adequately protected. In fact, virtually none of them are protected from über-development activities such as aggregate extraction or highway construction. Natural features are often treated simply as end-stage checks on development."

The ECO raised these types of concerns again in our 2006-2007 Annual Report. In that report, the ECO commented that the Growth Plan for the Greater Golden Horseshoe "reverses the sustainable planning process; it elevates the province's goal of accommodating population increases – with economic growth as the central driver – over the need to live within ecosystem limits."

There is a clear need for planning authorities to be capable of planning based on ecological principles. Natural features of the landscape – such as large moraines with significant hydrologic functions – should be used as the starting point to guide local land use planning decisions. The current land use planning system gives insufficient weight to environmental concerns and it does not adequately empower planning authorities to restrict all forms of development when it is ecologically inappropriate. Indeed, the passage of the *Oak Ridges Moraine Conservation Act*, while laudable in of itself, is an implicit acknowledgement that ecological principles do not normally guide the broader land use planning system.

5.4 Ministry of Natural Resources

Review of Application R2006015:

5.4.1 Measures to Conserve Woodland Caribou (*Rangifer tarandus caribou*) and its Habitat (Review Accepted by MNR)

Background/Summary of Issues

In October 2006, the Wildlands League submitted an application for review on the sufficiency of the measures that the Ontario government has in place to conserve woodland caribou (*Rangifer tarandus caribou*). The ECO forwarded this *EBR* application to the Ministry of Natural Resources (MNR), the Ministry of Northern Development and Mines (MNDM), the Ministry of the Environment (MOE), and the Ministry of Energy (ENG).

This *EBR* application was discussed on pages 75-81 of the ECO's 2006-2007 Annual Report. It also was discussed at length on pages 194-201 in the Supplement to the 2006-2007 Annual Report.

All of the ministries denied this *EBR* application, except MNR chose to undertake a "scoped review." MNR stated that this review will be completed by February 2008. As of August 2008, no review had been completed.

The applicants asserted that this review is warranted and in the public interest for the following reasons:

- "The activity of sustainable forest management, inclusive of managing for wildlife and wildlife habitat, occurs within public forests in Ontario;
- Widespread loss of caribou habitat in Ontario (including the majority of the area allocated to 'sustainable forest management') is well-documented, contributing to its status as a "threatened" species nationally;
- An important component of the mandate of the Ministry of Natural Resources, as expressed in their Statement of Environmental Values, is the stewardship obligation to the conservation of this forest species and its habitat;
- The linkages between habitat loss and the expansion of industrial forest harvesting are well established – guidelines provided to Sustainable Forest Licence holders by the Ministry of Natural Resources are a critical tool for implementing MNR's obligations in the forest;
- Without documented improvements in managing the impacts of industrial forestry upon caribou, further loss of habitat is predictable;
- Without this review it is unlikely that MNR will affect a timely review of its own, given the history of the subject guidance;
- Without this review, it is predictable that a further period of years will elapse in the name of "recovery planning", contributing to the current dire pressures on this species without any clearer direction being provided to harvesters operating around Caribou habitat; and,
- In more than one audit performed on operations in Ontario under the requirements of the *CFSA*, independent auditors of forest management units containing caribou have raised concerns about the implementation and/or likelihood of success of caribou guidance provided by MNR to forest management planners."

The Wildlands League was concerned that "while the government continues to delay actual (on the ground) implementation of a caribou recovery strategy, status quo industrial development continues... in critical caribou habitat." The applicants expressed concern that the existing guidance is only applicable to forestry operations on Crown land and that there is "no sound premise for assuming that the well-documented range recession of caribou in the face of industrial forest harvesting will be held in check." The Wildlands League states that these other forms of development include mining and mineral exploration activities, road building and hydroelectric development.

The applicants requested that the existing regulatory framework that guides the management of woodland caribou be reviewed. This regulatory framework includes MNR's Class Environmental Assessment Approval for Forest Management on Crown Lands in Ontario (Declaration Order MNR-71), the Provincial Wildlife Population Monitoring Program, the *Crown Forest Sustainability Act*, the Forest Management Guidelines for the Conservation of Woodland Caribou, the Natural Disturbance Emulation Guideline, the Forest Fire Management Strategy for Ontario, and the "draft" Recovery Strategy for Forest-dwelling Woodland Caribou (*Rangifer tarandus caribou*) in Ontario.

The Wildlands League stated that many components of this regulatory regime have been in place for a significant period of time, but that their effectiveness has not been comprehensively examined. For example, the Forest Management Guidelines for the Conservation of Woodland Caribou that apply to northwestern Ontario have been in place since 1994 and no assessment has ever been made public as to its actual effect on this species at risk. Further, the applicants state that a similar guideline for northeastern Ontario is "rumoured to exist," but that it has never been made public. The applicants expressed concern that this lack of a guideline for northeastern Ontario gives the appearance that this area is a "lower priority" despite the fact that it too has been identified as an area for the recovery of woodland caribou.

Ministry Responses

In February 2007, the Ministry of Natural Resources determined that this *EBR* application warranted a self-described "scoped review" of the ministry's monitoring provisions related to woodland caribou and their habitat. MNR stated that this review would be completed by February 2008.

MNR stated that its "existing, scheduled, and planned activities" address the majority of concerns raised by the applicants and there is no potential for harm to the environment (i.e., woodland caribou) in not undertaking the full review. On this basis, MNR stated a "comprehensive" review is unwarranted as:

- "MNR has already begun the Caribou Conservation Framework (CCF) initiative which will address the majority of the applicants' concerns related to MNR's areas of administration. The CCF, planned for completion in the fall of 2007, will include public consultation with a goal to provide comprehensive direction for appropriate caribou policy and the development of action plans in response to the provincial Recovery Strategy for Forest-Dwelling Woodland Caribou in Ontario."
- "The *Crown Forest Sustainability Act* (*CFSA*), the *Provincial Parks Act* (*PPA*), the *Environmental Assessment Act* (*EAA*) and related regulations, policies and guides, including the Forest Management Planning Manual, provide significant guidance for ongoing protection of woodland caribou. All of these were developed with full public review and consultation."
- "MNR is currently formulating new habitat guidance for woodland caribou through development of the forest Landscape Guide and Stand/Site Guide and is also undertaking a review of the provincial *Endangered Species Act*. Each of these initiatives have had extensive stakeholder and public involvement."

Forest management planning is conducted in accordance with the *Crown Forest Sustainability Act* and Declaration Order MNR-71 (replacing the Timber Management Class EA that applied between 1994 and 2003). The ministry states that in forest management units with populations of woodland caribou, objectives for woodland caribou management are established by planning teams and the provision of habitat is a priority. Additionally, MNR has been applying the Forest Management Guidelines for the Conservation of Woodland Caribou in northwestern Ontario since 1994.

The ministry also noted that it is in the process of consolidating its 34 forest management guidelines into five new guidelines. MNR states that these new guidelines will be finalized in 2007. As part of this consolidation, MNR will no longer be using its Forest Management Guidelines for the Conservation of Woodland Caribou. The new guidelines will provide "one approach to planning that is consistent for all woodland caribou range while recognizing differences in ecology and landscapes."

The conservation of this species has been an important factor in the establishment of several protected areas. MNR states that management plans for protected areas within woodland caribou range address objectives for the species. The ministry explains that the park planning process provides "existing opportunities for review, meeting the public interest for transparency and public consultation."

MNR states that it recently reviewed the sufficiency of its research and monitoring information on woodland caribou. Based on this review, MNR then "conducted an extensive survey of its staff as well as non-governmental individuals and organizations in Ontario to determine research priorities." The ministry also hosted a research workshop in the fall of 2006. MNR states that a summary report from the workshop was to be available by January 2007, but it was still not publicly released by the end of March 2007 despite requests by the ECO for a copy.

The ministry also stated that it was in the process of reviewing the *Endangered Species Act* (*ESA*). MNR states that the new legislation "will enhance the protection of endangered and threatened species (such as woodland caribou) and their habitats."

ECO Comment

MNR did not deny this *EBR* application, but, rather, it chose to conduct what it describes as a "scoped review" of its monitoring provisions for woodland caribou and their habitat. MNR stated that this review would be completed by February 2008. However, this review had not been completed as of May 2008. This delay is distressing given that that this very issue was brought to the ministry's attention in our 2001-2002 Annual Report:

> "Determining the impacts of forestry operations on the boreal population of woodland caribou is dependent on effective monitoring. The ECO encourages MNR to conduct a rigorous scientific monitoring program of the boreal population of woodland caribou."

Moreover, the ministry relied heavily on its yet-to-be released Caribou Conservation Framework to allay any possible concerns about the vulnerability of this species and its habitat. MNR told the applicants and the ECO that this framework would be released in the fall of 2007. As of May 2008, MNR had not released any such policy. Again, the ECO finds it very troubling that MNR has not released this important policy.

Further, MNR released a "draft" recovery strategy for the forest-dwelling population of woodland caribou in July 2006. However, as of August 2008, MNR had not released a final recovery strategy for implementation. Again, the ECO finds MNR's delay unacceptable as it leaves woodland caribou in a continued state of jeopardy.

In our 2006-2007 Annual Report, the ECO criticized MNR for its lengthy – and unacceptable – delays in putting in place effective measures to conserve woodland caribou. When MNR does completed its "scoped review" of the issues raised in the *EBR* application, the ECO will report on it in detail.

Review of Applications R2006031 and R200632:

Processing Applications for Pits and Quarries under the *Planning Act* (Review denied by MMAH, MNR

This application was reviewed in conjunction with R2006032 (MMAH). Please see section 5.3.1 under the Ministry of Municipal Affairs and Housing for the full review.

Review of Application R2007001:

5.4.2 Review of MNR's decision to designate the Parry Sound District under the *ARA* (Review Denied by MNR)

Geographic Area: Parry Sound District

Background/Summary of Issues

In April 2007, applicants used the *Environmental Bill of Rights* (*EBR*) to raise concerns about new operational rules imposed on sand and gravel operations in the Parry Sound District. The applicants requested a review of the decision by the Ministry of Natural Resources (MNR) to designate the Parry Sound District under the *Aggregate Resources Act (ARA)*, effective January 2007. Until this date, pits and quarries on private lands in this district had been regulated by local municipalities. Municipal rules typically set few or no requirements for fencing, site rehabilitation or other environmental aspects.

The applicants argued that the more stringent operational rules of the *ARA* would mean higher costs to operators and higher prices for sand and gravel products in the Parry Sound area. Thus more aggregate would be trucked in from greater distances, resulting in more air pollution from trucking. The applicants noted that the Parry Sound area has experienced smog advisories in recent years, and argued that increased air pollutants would be damaging to local tourism.

The applicants also noted that the Parry Sound District contains only limited resources of sand and gravel, especially in the northern area, and in areas near the shores of Georgian Bay. They also commented that MNR had previously attempted to designate the Parry Sound District under the *ARA* in the early 1990s, but then decided not to proceed. The applicants criticized MNR for failing to conduct social, economic or environmental studies on how the *ARA* would impact the Parry Sound District. In the opinion of the applicants, designation under the *ARA* would force some aggregate operators to close and would impose increased costs on local municipalities for road building materials.

Background:
The purposes of the *ARA* include minimizing adverse environmental impacts of aggregate operations. The Act requires that the environmental effects of a proposed pit or quarry be considered. However, the *ARA* does not apply everywhere in Ontario; while the Act and its regulations apply to Crown lands throughout the province, they apply to private lands only in specific areas, designated by regulation. MNR's long-term plan has been to gradually phase in all significant aggregate resource areas of Ontario, but the ministry's progress has been slow due to limited staff resources. MNR had previously proposed to phase in the *ARA* specifically to the Parry Sound area in 1994, but decided not to proceed in the face of local opposition as well as by a provincial recession and a dearth of MNR inspectors.

The issue of the designation of Parry Sound District under the *ARA* has been before the ECO once before. In 1998, applicants used the *EBR* to request that the *ARA* be extended to cover the Parry Sound District. They argued that large-scale unregulated aggregate extraction in the area was causing environmental damage, including erosion, fish habitat destruction and a failure to rehabilitate gravel pits, and that the municipality was not dealing with the problems. MNR denied the 1998 request, but confirmed its plans to gradually designate all significant aggregate resource areas of Ontario under the *ARA*.

Since then, the ECO and other observers have called for more areas of Ontario to be regulated under the *ARA*. MNR did take this step, announcing on October 30, 2006 that the *ARA* would apply to a number of new areas in central and northern Ontario – including Parry Sound districts – effective January 1, 2007. (At the same time, MNR also increased the annual fee and minimum royalty rate for aggregate operators.) MNR's announcement was accompanied by an emergency exception notice on the Registry (number RB06E6012). Emergency exception notices are provided for under section 29 of the *EBR*, and bypass normal notice and comment provisions. MNR argued that an emergency exception was needed in this case, because delaying the implementation of these regulation changes "would pose harm or serious risk of harm to the environment." MNR feared that aggregate operators would have attempted to get ahead of the new rules by hastily expanding existing sites or establishing new sites in previously undesignated areas.

Aggregate operators in the Parry Sound District complained that MNR had not consulted them on this change, and asked why MNR had instead consulted with the Ontario Stone Sand and Gravel Association (formerly the Aggregate Producers' Association of Ontario).

Ministry Response

MNR denied this *EBR* application in June 2007. MNR concluded there was little or no potential for environmental harm if the review was not undertaken, and stated that social, economic and environmental impacts had been considered prior to designating the Parry Sound area. The ministry acknowledged that some small, low quality aggregate sites might not be used as a consequence of the new rules, but argued that there was "greater environmental benefit by regulating significant production sites within the Parry Sound Area". Although MNR acknowledged there were limited sand and gravel deposits in West Parry Sound, the ministry also noted there was only a relatively small local demand for such types of aggregate, and there was abundant (crushable) bedrock suitable for most local needs. The ministry did not provide any quantitative information, except to cite a 1989 Aggregate Resources Inventory for the area.

MNR argued that the applicants' concerns were otherwise subject to periodic review, and noted that it had long been government policy to phase in the *ARA* to all areas of the province. The issue was subject to on-going internal reviews, and MNR also noted that a public review of the *ARA* regulations is anticipated within two years, with consultation. MNR did not agree with the applicants that the decision would bring increased air pollution from longer distance trucking of aggregates.

MNR noted that the expansion of the *ARA*'s rules over increasing geographic areas of Ontario is consistent with the ministry's Statement of Environmental Values, since both the Act and the SEV support concepts such as long-term health of ecosystems, continuing availability of natural resources for Ontarians, a need for economic development to be environmentally sustainable, and a need to restore and rehabilitate degraded environments

MNR promised a number of administrative measures to lessen the financial impact to aggregate operators within newly designated areas, including:

- extending the timeline for submitting a site plan from six months to 36 months;
- waiving the application fee for all Class B licence applications received prior to June 30, 2007;
- providing a sample Class "B" site plan to assist operators with the preparation of their own site plans and dedicating MNR staff to assist in site plan preparations when requested; and,
- relieving licensees from the need to submit a compliance assessment report for 2007 or until the approval of a site plan.

MNR also promised to be flexible on the fencing of site boundaries and might also allow the removal of topsoil if suitable alternatives for rehabilitation were proposed.

ECO Comment

MNR had reasonable grounds for turning down this application for review, because the ministry determined that the environmental benefits of applying *ARA* requirements would have a greater long-term environmental benefit. The ECO agrees with MNR on this key point. There is bound to be a period of adjustment for affected businesses whenever new rules are put in place, but this should not be sufficient grounds to leave environmental impacts unregulated. The *ARA* has been in effect across large areas of Ontario since 1990, and the aggregate industry has continued to operate profitably under this regime. As described above, the ministry has also put in place a number of very generous measures to ease the transition for newly regulated operations.

It has been a long-standing ministry policy that the *ARA* would gradually be expanded to all aggregate resource regions of Ontario. Operators in undesignated areas would have known that designation was just a matter of time. In the Parry Sound area, operators have had since 1994 to gradually familiarize themselves with the requirements under the *ARA*, and to find cost effective opportunities to adjust their practices. Public expectations regarding protection of water and natural heritage have grown and become more sophisticated over the last two decades. As a result, industries of all types – not just the aggregate industry - are experiencing heightened demands for environmentally responsible practices.

The ECO notes that MNR's response to the applicants did not offer any recent data on the state of aggregate resources or aggregate consumption trends in the Parry Sound area. There is also evidence that MNR was not able to get newly hired district staff into place in time to efficiently coordinate the roll-out of the *ARA* in the newly designated areas. These observations are part of a much larger problem; MNR's aggregate resources program has faced a chronic shortage of resources and staff, including resources necessary to update the ministry's aggregate resources inventory, last updated in 1992. The ECO described this capacity problem in the April 2007 Special Report "Doing Less with Less", pages 45-49.

Review of Application R2007002:

5.4.3 Review of the *Provincial Parks and Conservation Reserves Act* (Review Returned by MNR)

Background/Summary of Issues

In April 2007, an application under the *Environmental Bill of Rights* (*EBR*) was submitted that requested that the Ministry of Natural Resources (MNR) review the *Provincial Parks and Conservation Reserves Act*. The applicants requested that the ministry review the legislation to prohibit recreational hunting and the use of all-terrain vehicles in protected areas. The *Provincial Parks and Conservation Reserves Act* passed Third Reading and received Royal Assent in June 2006; it came into force in September 2007.

The *Provincial Parks and Conservation Reserves Act* prohibits hunting in provincial parks, unless it is allowed by exception under the *Fish and Wildlife Conservation Act*. By default, the statute allows hunting in all conservation reserves. The applicants asserted that recreational hunting was an environmentally harmful activity that conflicted with the planning and management principles within the *Provincial Parks and Conservation Reserves Act*. They also stated that allowing recreational hunting in protected areas brought into question the intent and application of the *Endangered Species Act* (now replaced by the *Endangered Species Act, 2007*) as it did not prevent the hunting of some species at risk in protected areas.

Despite its recent introduction, the *Provincial Parks and Conservation Reserves Act* did not change the manner in which recreational hunting is permitted in protected areas. Hunting was a permissible activity in Ontario's protected areas when the *Provincial Parks Act* governed provincial parks and the *Public Lands Act* governed conservation reserves. The ECO notes that recreational hunting is allowed in more than two-thirds of Ontario's total number of protected areas: it is a permissible activity in 132 out of 329 provincial parks and in all 292 conservation reserves.

The applicants stated that the statute is ambiguous with regard to the use of all-terrain vehicles in protected areas. They asserted that "scientific studies have shown that motorized access critically undermines ecological integrity in protected areas." The ECO notes that the only indirect reference to all-terrain vehicles in the *Provincial Parks and Conservation Reserves Act* is that visitors to wilderness class parks must "travel by non-mechanized means, except as may be permitted by regulation." Subsequent to the filing of this *EBR* application, MNR finalized O. Reg. 319/07 (Conservation Reserves: General Provisions), O. Reg. 346/07 (Mechanized Travel in Wilderness Areas), and O. Reg. 347/07 (Provincial Parks: General Provisions) that address the use of all-terrain vehicles in protected areas.

Ministry Response

MNR did not undertake the review. The *Provincial Parks and Conservation Reserves Act* received Royal Assent in June 2006, and it did not come into force until September 2007. The *Provincial Parks Act* was still in force at the time that this *EBR* application was submitted, having not yet been repealed. On these grounds, the ministry stated that it would be premature to consider this application, but the ministry invited the applicants to resubmit it once the *Provincial Parks and Conservation Reserves Act* came into force.

ECO Comment

The ECO believes that this *EBR* application raises valid questions with regard to how MNR will decide what are appropriate activities in Ontario's protected areas. The new *Provincial Parks and Conservation Reserves Act* states that the "maintenance of ecological integrity shall be the first priority," and that the restoration of ecological integrity shall be considered, in all aspects of planning and management. The statute defines ecological integrity as "a condition in which biotic and abiotic components of ecosystems and the composition and abundance of native species and biological communities are characteristic of their natural regions and rates of change and ecosystem processes are unimpeded."

The assessment of which activities should be permitted or prohibited is undoubtedly a fundamental component of managing protected areas for ecological integrity. The new *Provincial Parks and Conservation Reserves Act* allows for "sustainable outdoor recreation opportunities" in provincial parks and "ecologically sustainable land uses, including traditional outdoor heritage activities" in conservation reserves. However, the ECO noted in our 2006-2007 Annual Report that "the recreational harvest of species can conflict with the maintenance of ecological integrity in a protected area and can impair their utility as true ecological benchmarks or reference areas."

The ECO believes that MNR should develop a scientifically defensible protocol for the ministry to follow when evaluating hunting and deciding whether it ought to be considered an ecologically appropriate and sustainable activity in a given protected area. MNR should detail in the management plan or statement for a protected area its rationale on a species-by-species basis when the recreational hunting is permitted. These measures are necessary to demonstrate and ensure that the maintenance of ecological integrity is the first priority for Ontario's protected areas.

Review of Application R2007007, R2007008, R2007009:

5.4.4 The Need for Municipal Climate Change Adaptation Strategies (Review Denied by MNR, MMAH, undertaken by MOE)

Background/Summary of Issues

The applicants submitted this application to the ECO on April 12, 2007. They contended that there is a need for legislation that requires municipalities to put in place climate change adaptation strategies, particularly with regard to stormwater infrastructure. They felt that this is particularly urgent given that Ontario's stormwater infrastructure is aging.

In addition to providing background on climate change and adaptation research, the applicants provided four principal reasons why the ministries identified (Environment, Natural Resources, Municipal Affairs and Housing) should undertake their review:

1) Global climate change is influencing weather patterns in North America. This climatic variability is causing more frequent extreme weather events to occur. As a result there is increased pressure on municipal storm water infrastructure and an increased risk of economic losses from flooding to the province as well as the private sector.

2) Management of storm water infrastructure in Ontario is done through 'best management practices' which only large municipalities have the economic means to undertake. The applicants noted that MOE's Stormwater Management Planning and Design Manual 2003 is a guidance document for municipalities and urban developers to consult and that there is no legal requirement to follow the guidelines. They felt that those municipalities which can afford to follow the manual's guidance will do so, but those which can not afford to do so, will not. This means some municipalities will have inadequate stormwater infrastructure to deal with the forecast heavier precipitation events expected as a result of climate change.

3) The applicants claimed that there is no standardization of storm water infrastructure for municipalities; and also, that storm water infrastructure which currently exists may be inadequate to accommodate the changing climate.

4) Damage already caused to local infrastructure has shown the weakness in existing storm water management systems in Ontario and the economic costs resulting. The applicants cited the July 2004 rainfall event in Peterborough which led to extensive flooding and also the August 2005 rainfall event in the northern half of the City of Toronto. The latter cost the City of Toronto and residents approximately $500 million in repairs.

Ministry Response

Ministry of Natural Resources (MNR):
MNR denied this application in a letter dated June 25, 2007 stating that it was beyond MNR's mandate and because:

- Municipal stormwater infrastructure is a municipal responsibility and stormwater design and planning direction is led by MOE;
- The *Planning Act* provides the legislative tools to allow municipalities to implement stormwater management for new development and the Provincial Policy Statement provides general policy guidance on matters of provincial interest, both of which are the responsibility of MMAH;
- The *Conservation Authorities Act* provided for regulations for the control of development in areas such as river valleys and wetlands; and

- The potential effects of climate change still require assessment.

Ministry of Municipal Affairs and Housing:
MMAH wrote to the applicants in a letter dated July 5, 2007 to inform them that it had denied this application and provided reasons. The ministry reported that the improved *Planning Act* will assist municipalities in the management of climate change, for example, by providing municipalities with new powers to include sustainable design elements through the site plan control process. MMAH wrote that this could be used to better control the effect of the possible consequences of climate change.

The *Planning Act* also contains provisions that: require municipalities to have regard to flood control when considering plans of subdivision and consent applications; empower municipalities to apply site plan control conditions pertaining to stormwater; and require municipalities to make decisions consistent with the Provincial Policy Statement provisions dealing with stormwater management practices to minimize stormwater volumes.

MMAH also reported that the technical guidance and direction suggested by the application was beyond the scope of the *Planning Act* and that the Ministries of Environment and Natural Resources along with Conservation Authorities, provide technical guidance and direction to assist municipalities to regulate stormwater.

Ministry of the Environment (MOE):
On February 26, 2008, MOE informed the applicants and the ECO in a letter that it was undertaking the review and that it should require up to 24 months to complete. The ECO notes that the ministry response was provided approximately eight months after the date required under the *EBR*. The ECO will track this undertaking and report our findings when MOE completes its review, currently planned for March 2010.

ECO Comment

The ECO believes that it is appropriate that MOE undertake this review as the matter is environmentally significant and MOE is the ministry with the greatest degree of authority and expertise in this matter. The ECO will provide a full review of ministry handling of this application once MOE has completed its review.

Review of Applications R2007010, R2007011, and R2007012:

Review of the Need to Protect the Paris Galt Moraine
(Review Denied by MMAH & MNR, Undertaken by MOE)

This application was reviewed in conjunction with R2007010 (MOE) and R2007012 (MMAH). Please see section 5.3.3 under the Ministry of Municipal Affairs and Housing for the full review.

Review of Application R2007019:

5.4.5 Request for Review of the Forest Management Planning Process and the Protection of Migratory Birds
(Review Denied by MNR)

Background/Summary of Issues

In November 2007, the ECO received an application requesting a review of Ontario's forest management planning process "to ensure that migratory bird and other wildlife populations are being sustained at both eco-regional and provincial levels, and that the habitats on which they depend are sufficiently protected." EcoJustice Canada (formerly Sierra Legal) submitted the application on behalf of the two applicants representing Ontario Nature and the Wildlands League branch of the Canadian Parks and Wilderness Society, as well as five other environmental non-governmental organizations (ENGOs). The ECO forwarded the application to the Ministry of Natural Resources (MNR).

This application for review was largely based on the findings of the Commission for Environmental Cooperation (CEC) set out in a Factual Record, entitled "Ontario Logging Submissions," that was publicly released in February 2007. The Factual Record relates to two submissions made to the CEC in 2002 and 2004 by many of the same organizations that submitted this application. The organizations alleged in their submissions to the CEC that the Government of Canada was failing to effectively enforce section 6(a) of the Migratory Birds Regulations made under the federal *Migratory Birds Convention Act, 1994*. The allegation related to Ontario's forest industry in 2001. The applicants submitted that 45,000 migratory bird nests were destroyed by clear-cutting activity in Ontario's forests in 2001 alone. The CEC Factual Record included an extensive review of Ontario's forest management system, and identified numerous deficiencies and problems with the conservation and protection of migratory birds and other wildlife in Ontario's forests.

In this application for review, the applicants asserted that the CEC's findings about widespread destruction of migratory bird nests by forestry activities, high levels of projected habitat declines, declining populations of various species, and the absence of land use planning and wildlife population targets all pointed to the need for a review of several of MNR's forest management policies. The applicants argued that "[b]irds are an integral component of terrestrial wildlife diversity in the Boreal forest region, and forest management practices are required to conserve biodiversity as the forest is harvested, as outlined in various MNR publications."

The applicants expressed concerns about: migratory bird habitat and population declines under forest management alternatives; the importance of identifying wildlife habitat needs in advance of forest management planning; the need for ecosystem-based management; the need for more sophisticated and precautionary modeling to predict wildlife habitat; the need for comprehensive monitoring of bird populations; the lack of subregional land use planning in the Area of the Undertaking for commercial forestry on Crown lands (AOU); coordination and lack of enforcement; and lack of capacity at MNR, due to insufficient funding, to adequately fulfill its wildlife and forest sustainability roles.

The applicants discussed in detail each of eight specific concerns related to the forest management planning process that they sought to have reviewed, identifying specific shortcomings and recommending a number of specific actions to be taken by MNR to better protect migratory birds and their habitat from Ontario forestry operations. In particular, the applicants recommended that:

- "in order to properly manage wildlife populations, the amount of required habitat should be determined based on the amount and types of habitat throughout the eco-region, beyond the limited boundaries of the Forest Management unit (FMU) as is currently the case";
- "a policy clarification or change [be made] whereby wildlife habitat needs are determined by MNR experts in advance of forest management planning and then entered into spatial habitat models as constraints on how much and where logging is allowed to take place"; and
- MNR consider a reverse-matrix approach or policy that "considers the land base as a whole as a supportive ecological framework within which pockets of resource development activities are allowed to be carried on," to replace the traditional land use planning paradigm of "dividing the land base into resource management units dotted with islands of protection."

CEC Factual Record:
The Commission for Environmental Cooperation (CEC) is an international organization established pursuant to the North American Agreement on Environmental Cooperation (NAAEC), a side accord signed in 1993 by Canada, the United States and Mexico under the North American Free Trade Agreement (NAFTA).

The NAAEC establishes a process that allows residents and non-governmental organizations of North America to make requests to the CEC to review and investigate allegations that a Party to the NAAEC is failing to effectively enforce its own environmental laws. When such a claim is submitted to the CEC, the CEC reviews the matter and, if certain criteria are met, conducts an investigation. Subsequently, the CEC may develop and publish a document called a "Factual Record" that sets out the CEC's findings, subject to CEC Council approval. A Factual Record is intended to be an objective description of the relevant facts underlying the submission, the history of the issue, the environmental law(s) in question, and the steps taken by the Party to fulfil its obligation to enforce its environmental laws effectively.

Ministry Response

In February 2008, MNR denied this *Environmental Bill of Rights* (*EBR*) application. MNR denied the application based on its determination that the public interest does not warrant a review because "the existing legal and policy framework, its planned and ongoing implementation, and scheduled and planned actions by the ministry to review and amend policies where appropriate, address the concerns outlined by the applicants."

MNR noted that this application for review relied heavily on the CEC Factual Record on the Ontario Logging Submissions. MNR stated that the Factual Record is "not an accurate depiction of MNR's management of wildlife habitat in forest management planning…."

MNR also stated that, since the original submission to the CEC was filed in 2002, "a number of changes have been made to forest management planning that has [*sic*] improved MNR's approach," including amendments to the *Crown Forest Sustainability Act*, the Declaration Order regarding MNR's Class Environmental Assessment Approval for Forest Management on Crown Lands in Ontario (Declaration Order MNR-71), and the Forest Management Planning Manual.

MNR provided a clear and detailed rationale for its decision that included: a discussion of the factors considered pursuant to the *EBR*, including consideration of MNR's Statement of Environmental Values (SEV); a summary of the legal and policy framework for forest management planning in Ontario; and specific responses to each of the eight "policies" identified by the applicants as requiring review (although MNR emphasized that not all of those items identified by the applicants are considered by MNR to be policies). MNR outlined eight primary reasons for determining that no review was warranted:

- MNR's comprehensive forest management planning framework includes extensive public reporting and consultation, including "multiple opportunities to input into the direction of [a Forest Management Plan] and the contents of the plan prior to approval by the Regional Director," and is subject to legally required periodic review (for example, all forest management guides must be reviewed at least every five years, in accordance with Declaration Order MNR-71, as amended);
- MNR is committed to ongoing scientific studies and monitoring of wildlife habitat and populations, including: 1) the Provincial Wildlife Population Monitoring Program (PWPMP), being implemented within the AOU (required under Declaration Order MNR-71, as amended), which includes collection of data on migratory birds and testing the effectiveness of forest management guides; and 2) a Wildlife Assessment Program (WAP), developed under the auspices of the PWPMP, to identify the effects of forest management practices on selected wildlife species;
- MNR's new Landscape Guide, which MNR says is currently being developed with stakeholder participation and will include further public consultation, "will provide direction on how to conserve

biodiversity through landscape level approaches" and "[a]s a result, wildlife habitat for a variety of species, including migratory birds will be addressed at a landscape level";

- MNR continues to use "area of concern" prescriptions to protect known wildlife values during the forest management planning process;
- MNR is developing an "effectiveness monitoring approach" to evaluate the accuracy of habitat models and predictions of expected wildlife response to forest management activities, which "is being incorporated into its new [Landscape Guide and Site and Stand Guide] and is integral to their periodic review";
- MNR is exploring new approaches to understanding wildlife habitat dynamics and forecasting, and stated that "[a]s new science and information becomes available forest management and habitat modelling tools are continually being improved";
- Through the development of its Landscape Guide, MNR stated that it is developing an increased understanding of habitat supply level variation in the absence of human activities, knowledge that MNR says "will create a more robust process for FMP teams to use in forest management planning;" and
- MNR specifically refuted the applicants' allegations that there is a "practice of leaving most of the allocated forest open to unrestricted logging" and that the forest industry is permitted to set timber harvesting levels. MNR clarified that harvest levels, habitat objectives and long-term management direction are all determined by planning teams and are subject to a rigorous Forest Management Plan public review and approval process, including approval by the Regional Director.

The ministry concluded, based on the reasons set out in the decision notice, that there is no potential for harm to the environment if the review applied for is not undertaken.

MNR also clarified that, contrary to the applicants' allegations, MNR does not have a policy to approve Forest Management Plans as long as preferred habitat for indicator species does not fall more than 20 per cent below the extremes of the natural benchmark. MNR responded that, while Forest management planning teams were advised by the 1996 Forest Management Planning Manual (FMPM) to use this as guidance in evaluating forest management impacts on wildlife habitat, "[c]urrently, FMP planning teams, directed by the 2004 FMPM, are advised to develop their own evaluation methodology."

MNR confirmed the applicants' concern that only values that are "known values" (i.e., for which sufficient information is known to describe their geographic location and basic features) must be depicted on values maps and considered in forest management planning. MNR clarified, however, that "[a] precautionary principle may be employed to reduce the risks of significantly affecting a value in a negative way in the absence of conclusive information about a value."

MNR noted that forest management plans must comply with the *Crown Forest Sustainability Act*, and that operations must emulate natural disturbance patterns similar to those that have shaped migratory bird habitat in the Area of Undertaking. MNR stated that "[p]redicted changes in wildlife habitat supply, due to management activities, are evaluated relative to changes in habitat supply in a dynamic 'natural' landscape or the benchmark." The new Landscape Guide (not yet released as of August 2008) will implement "a simulated range of natural variation approach."

MNR discussed its involvement with Bird Studies Canada and the Ontario Region Canadian Wildlife Service in the Partners in Flight North American Landbird Conservation Plan, a "blueprint for continental landbird conservation." MNR noted that the objectives in the Bird Conservation Region (BCR) plans being developed to provide recommendations about Ontario landbirds and habitat will be consistent with Ontario's current forest management objectives "to ensure that the supply of forest habitat types across the landscape are maintained within the range of natural variation."

MNR stated that it was also a partner in the production of the Atlas of Breeding Birds of Ontario 2001 – 2005. MNR noted that the draft Atlas reports that "[s]ubstantially more forest bird species increased than decreased in Ontario as a whole and in all regions except the Carolinian" and that, in the context of timber harvesting, "more attention has been paid to wildlife habitat requirements in management practices."

MNR further noted that the Atlas reported an increase in forest birds such as the pileated woodpecker, in contrast to the applicant's statement (citing the CEC Factual Record) that the habitat of the pileated woodpecker is projected to decrease by 35 per cent. MNR noted that only 5.3 per cent of the annual harvest in Ontario (representing 0.053 per cent of the total harvest area) occurs during forest bird nesting/fledgling season.

MNR also identified a number of other scientific studies in which MNR staff scientists are currently engaged, all of which relate to the effects of forest management activities on wildlife habitat. Most of the studies are focussed specifically on forest birds.

Finally, MNR advised that the Forest Ecosystem Science Co-operative and the Sustainable Forest Management Network would be sponsoring a workshop in April 2008 "on the state of science with respect to songbirds and forest management in Ontario." MNR indicated that proceedings would be produced for the workshop.

In August 2008, the applicants wrote a letter to MNR expressing their dissatisfaction with MNR's decision.

Other Information

Previous ECO Reviews of Forest Management Initiatives:
In the Supplement to our 2004–2005 Annual Report (page 191), the ECO reviewed the amended Forest Management Planning Manual (FMPM), which MNR identified in this decision as an improvement in forest management planning since 2002. The ECO notes that many commenters raised concerns about the way MNR intended to assess sustainability in the FMPM, particularly the choice of indicators and the inference that if the FMU achieved its management objectives then sustainability would also be achieved.

The ECO has also reviewed MNR's use of the principle of natural disturbance pattern emulation in its forest management policies (in the Supplement to our 2001–2002 Annual Report, page 149) and MNR's Forest Fire Management Strategy (in the Supplement to our 2004–2005 Annual Report, page 198). Forest fires are the primary agent of natural disturbance in the boreal forest. MNR has acknowledged that the mechanical process of clearcutting does not fully emulate forest fires; forest fires are a chemical process to which species are adapted. Fire and clearcutting differ in terms of nutrient recycling, pathogen control, soil compaction and species regeneration. Forest harvesting and fire suppression also change forest vegetation species composition. A recent study to determine whether forestry practices in Ontario emulate natural disturbance from the perspective of bird populations found that 45 per cent of the bird species analyzed differed in abundance depending on forest disturbance type (i.e., fire or harvesting).

Atlas of the Breeding Birds in Ontario, 2001-2005:
As noted by MNR, the *Atlas of the Breeding Birds in Ontario, 2001-2005*, released in 2007 and based on data collected by 3,000 volunteers who spent over 150,000 hours in the field, indicates that forest bird populations, including migratory species in the boreal forest, are generally doing well. More forest bird species appear to have increased than decreased over the last 20 years. While these results are encouraging, scientists involved with the Atlas note that the data should be interpreted with caution. Because of the change in number of volunteers, time spent in the field, and improved efficiencies at surveying and finding birds, the reliability of comparing populations now and 20 years ago (when the last atlas was published) is limited. Other surveys seem less encouraging; Bird Studies Canada reported in 2003 that long term North American *Breeding Bird Survey* trends indicated that at least 40 species of landbirds were experiencing population declines in Canada's boreal forest. The National Audubon Society reported in June 2007, based on an analysis of forty years of bird population data collected by volunteers, that a wide variety of common bird species, including some boreal forest birds, are in steep decline.

Migratory Birds Convention Act, 1994:
Environment Canada is considering a new regulatory approach to manage the "incidental take" (i.e., inadvertent destruction) of migratory birds, nests or eggs during industrial activities and development. Incidental take is currently a violation of the Migratory Birds Regulations under the federal *Migratory Birds Convention Act, 1994*. The proposed new framework, intended to "provide for long-term conservation of migratory birds," would involve requiring proponents to assess the risk that incidental take will occur as a

result of their operations, and then to develop a response to the risk by avoiding the incidental take or seeking a either permit or exemption where avoidance "may be difficult." Environment Canada sought stakeholder comments on background documents for the proposed new regulatory approach in late 2007 and early 2008. The ECO will be monitoring this federal government initiative, and considering potential implications to Ontario's forestry regime and efforts at migratory bird protection.

Meanwhile, in early 2008, J.D. Irving Ltd. initiated a constitutional challenge of the *Migratory Birds Convention Act, 1994* as part of its defence to charges laid against it under the Act. The charges against the company stem from the alleged destruction of a number of great blue heron nests in the summer of 2006 during construction of a logging road on company land in New Brunswick. The challenge, which had implications for Canada's approach to protecting migratory birds and for forestry, energy and mining companies across the country, was referred to as "one of the most significant environmental law cases to come down in years." In June 2008, the Provincial Court of New Brunswick denied the company's constitutional challenge and upheld the legislation.

ECO Comment

The ECO believes that the applicants have raised valid concerns about the effects of Ontario logging operations on migratory birds. It is undeniable that logging results in habitat loss, and that logging during nesting/fledgling season puts forest birds, nests and eggs at risk. However, the ECO accepts MNR's rationale for denying the application. The planned and ongoing implementation of the existing legal and policy framework for forest management, as well as MNR's plans to review and amend policies – if fulfilled – should address the applicants' concerns without initiating a separate review. The ECO is satisfied that MNR has already turned its mind to the important issues raised by the applicants.

MNR addressed each of the applicants' concerns in a clear and organized fashion, including point-by-point responses to the applicants' concerns about the eight "policies" identified as requiring review. MNR also provided clarification on some of the issues raised by the applicants, and described the planned and ongoing programs, policies and scientific studies that MNR says will, among other things, "identify and assess population trends of selected wildlife species that may be affected by forest management practices," "provide direction on how to conserve biodiversity through landscape level approaches," and "contribute to MNR's efforts to attempt to meet the habitat requirements of a broad range of wildlife species, including migratory birds." This information may help to resolve some of the applicants' concerns, and identify future opportunities for the applicants to comment on and participate in MNR policy and program decision-making.

Of the one to three billion migratory landbirds that nest in Canada's boreal forest every year (representing more than half of the world's population of landbird species), it is estimated that one third of those are found in Ontario. Because of the great importance of Ontario's boreal forest to landbirds across North America and globally, conservationists believe that the Ontario government in general, and MNR specifically, owe a high stewardship responsibility to protect forest birds. The ECO agrees. Regardless of recent good news stories about forest bird population trends over the last 20 years, MNR must be proactive in ensuring that its forest management policies reflect the most precautionary approach to protection of all bird populations and other wildlife now and into the future.

The ECO is concerned about the strength of the wildlife population programs that MNR reports to be implementing. Insufficient long-term bird population monitoring in Canada's boreal forest has been identified as an impediment to assessing the sustainability of boreal bird populations. Better monitoring is needed to achieve greater confidence about the status of birds in the boreal forest and the effects of forestry on bird habitat. MNR must not use a lack of available data, particularly about more difficult-to-survey forest interior species, to excuse forestry operations from protecting wildlife habitat. The ECO strongly urges MNR to make permanent and long-term forest bird monitoring in the FMUs, and beyond, a priority.

Furthermore, MNR's confirmation that only "known values" are required to be depicted on values maps and considered in forest management planning points to a critical need for ample resourcing to ensure that, in fact, all values in the forest are being identified and protected.

Given that only 5.3 per cent of the annual harvest occurs during forest bird nesting/fledgling season, the ECO wonders if there should be a clear ban on harvesting during this period. It has been reported that some logging companies have voluntarily halted spring cutting for a variety of environmental reasons. Some Ontario municipalities have also considered or enacted by-laws that allow municipalities, through conditions applied to harvest permits, to restrict logging in area woodlands when migratory songbirds are nesting.

As the ECO noted in our 2006-2007 Annual Report, in the absence of a comprehensive land use planning system in the north, the current system of forest management planning has become the *de facto* land use planning system. The ECO is concerned that MNR, in focusing on forest management, assigns management of non-timber values – including ecological values such as migratory bird habitat and populations – lower priority in its decision making, contrary to its SEV. The ECO continues to believe that the *Public Lands Act* needs to be reformed so that provincial Crown lands are managed in a more integrated way and the protection of ecological values becomes a predominant legal requirement.

The ECO notes that the rationale for MNR's decision on this application strongly resembles its rationale for denying, in 2006, an application for a review of the sufficiency of Ontario's measures to conserve woodland caribou. The ECO reported on that application in its 2006-2007 Supplement at page 194. In that decision, MNR also relied heavily on a number of "scheduled and planned activities," such as the yet-to-be-released Landscape Guide and the Stand and Site Guide, in declining to undertake a review. The ECO hopes that MNR does not regularly reject meritorious applications using such a rationale, because promised initiatives sometimes do not materialize in a timely manner. Moreover, section 2 of the *EBR* contemplates that the public will be able to exercise their rights in a timely and efficient way.

MNR's to-do list is ambitious, and the ECO is concerned about MNR's ability to deliver on its promises. The much-heralded Landscape Guide (slated for release in 2007 and still yet to be released as of August 2008) has been touted as being under development by MNR since 2001, but the ECO has yet to see any progress on this front. As the applicants noted, the ECO has identified serious shortfalls in MNR's capacity to inventory, monitor, assess and report on wildlife resources, including its obligation to assess the effect of commercial forestry on wildlife through the PWPMP. For MNR to effectively, and in a timely manner, implement the planned programs and policies referred to in its decision, MNR must have and devote adequate resources to those initiatives.

The ECO urges MNR to make the implementation of the initiatives referred to in its decision a priority, and to continue to consider other approaches to ensure that forest management practices in Ontario are consistent with MNR's important obligation to protect the habitat of migratory birds and other forest wildlife.

Review of Applications R2007021 and R2007022:

Review of the Need to Amend the *Mining Act* and the *Provincial Parks and Conservation Reserves Act*

(Review Denied by MNDM and MNR)

This application was reviewed in conjunction with R2007021 (MNDM). Please see section 5.5.2 under the Ministry of Northern Development and Mines for the full review.

Review of Application R2007023:

5.4.6 Request to Regulate Wolf Lake Old Growth Forest Reserve as a Protected Area (Review Denied by MNR)

Background/Summary of Issues

In January 2008, an application for review was filed requesting that Wolf Lake Old Growth Forest Reserve be regulated as a protected area under the *Provincial Parks and Conservation Reserves Act, 2006* (*PPCRA*). Alternatively, the applicants requested that the Ministry of Natural Resources (MNR) find a comparable contiguous area of red pine old growth in the immediate area. Wolf Lake Old Growth Forest Reserve is adjacent to Chiniguchi Provincial Park.

In 1999, MNR released Ontario's Living Legacy (OLL) Land Use Strategy, which recommended the creation of 378 new protected areas on Crown lands in Ontario. It was later revealed, however, that 66 of these proposed protected areas (including Chiniguchi Provincial Park) either had mining claims when they were proposed or there were mining claims staked before MNR requested that the Ministry of Northern Development and Mines (MNDM) remove the areas from staking. In 1999, lands within Chiniguchi Provincial Park that overlapped with existing mining lands were designated as forest reserves, one of which is Wolf Lake Old Growth Forest Reserve. Chiniguchi Provincial Park was regulated in 2006 under the *PPCRA*.

In 2005, MNR indicated that it intended to remove the forest reserve designation for land in Wolf Lake Old Growth Forest Reserve, re-designate the area to a general use area or enhanced management area, and seek replacement areas. MNR has begun pre-consultation with stakeholders in an effort to seek consensus for the disentangelement proposal to remove the reserve's land use designation and seek suitable replacement lands.

The applicants state there is a need for a review because Wolf Lake Old Growth Forest Reserve was recognized under Ontario Living Legacy and has "international significance as the largest contiguous red pine old growth forest – arguably in the world." Therefore, the applicants believe that the province must do everything in its power to "remove the threat of mining activity from the reserve and ensure its regulation as a protected area."

The application was sent to both MNR and MNDM.

Ministry Response

MNR denied the application for review on April 10, 2008.

ECO Comment

The ECO will review this application in our 2008-2009 Annual Report.

Review of Application R2007024:

5.4.7 Review of Section 6.3 of the Temagami Area Park Management Plan (Review Denied by MNR)

Background/Summary of Issues

In January 2008, two applicants submitted an application for review of the recently approved Temagami Area Park Management Plan (the "park management plan"). The applicants assert that section 3.1 of the recently passed *Provincial Parks and Conservation Reserves Act 2006* (*PPCRA*) contains new information that was not considered by the Ministry of Natural Resources (MNR) in its management planning of Lady-Evelyn Smoothwater Provincial Park. This section of the Act states that ecological integrity shall now be the first priority in guiding provincial park planning and management.

Background:

The Temagami area is a rugged, remote landscape rich in significant natural, cultural, and recreational resources. It is recognized for its stands of old growth red and white pine ecosystems, its sacred sites for local First Nation people, and its numerous lakes, rivers, and interconnecting canoe routes. Moreover, the solitude and challenge of the Temagami backcountry has earned the area a reputation as a leading tourist destination for wilderness enthusiasts.

In June 2004, MNR initiated a planning process to develop the management direction for five provincial parks and eight conservation reserves in the Temagami area. This planning process, termed the Temagami Integrated Planning (TIP) project, also examined the recreational use of the surrounding Crown land and was initiated to meet commitments made through the approval of the Temagami Land Use Plan (1997). In August 2007, MNR released three approved plans that resulted from this process: a park management plan for five provincial parks in the Temagami area (Lady Evelyn-Smoothwater, Makobe-Grays River, Obabika River, Solace, and Sturgeon River); a resource management plan for the eight conservation reserves that surround the parks; and a Crown land recreation plan for Crown lands in the Temagami area. The ECO reviews these three plans in Part 2.6 of this Annual Report and section 4.21 of this Supplement.

At 76,107 hectares (ha), Lady Evelyn-Smoothwater Provincial Park (a wilderness class park) constitutes the bulk of Temagami's protected areas. The legal purpose of a wilderness class park is to "protect large areas where the forces of nature function freely and where visitors travel by non-mechanized means and experience solitude, challenge and personal integration with nature."

The Temagami Area Park Management Plan partitions Lady Evelyn-Smoothwater Provincial Park into several zones: one large wilderness zone, two nature reserve zones, and six access zones. The purpose of wilderness zones is to provide wilderness experiences and protect significant natural and cultural features while the purpose of nature reserve zones is to protect significant earth and life science features. In contrast, the purpose of access zones is to serve as staging areas where minimal facilities support access to other zones.

While the Temagami Area Park Management Plan prohibits motorized travel in the nature reserve zones in Lady Evelyn-Smoothwater Provincial Park, motorboats and authorized commercial aircraft landings are permitted on specific lakes in the park's wilderness zone. Furthermore, the plan permits motorboat, snowmobile, and aircraft landing access deep into the park by way of the six access zones. Snowmobiles, for example, are permitted on a trail that bisects the western portion of the park. Another access zone permits motor vehicles (including cars and ATVs) on a portion of the former Liskeard Lumber Road that extends from the north boundary of the park six km southward to a staging area for boaters near Gamble Lake.

In September 2007, a month after the park management plan was released, the new law governing Ontario's protected areas came into effect. While little legal direction was previously given to the purpose of protected areas, the *Provincial Parks and Conservation Reserves Act, 2006* states that the maintenance of ecological integrity will now be the first priority in the planning and management of protected areas.

Summary of Issues:
The applicants requested a review of section 6.3 of the Temagami Area Park Management Plan, arguing that the prioritization of ecological integrity in section 3.1 of the *Provincial Parks and Conservation Reserves Act* constitutes new information that was not considered during the management planning for Lady Evelyn-Smoothwater Provincial Park.

Furthermore, the applicants believe that the park management plan fails to protect ecological integrity by allowing motorized access in this wilderness class park. The application presented an extensive array of scientific studies that indicate that motorized access, whether by car, ATV, motorboat, or snowmobile, poses significant threats to vegetation and wildlife. Potential impacts include the fragmentation of landscape, the creation of migration routes for invasive species, and the displacement of animals from critical habitat.

The applicants also point out that a previous CPAWS Wildlands League report and MNR reports indicate that it is extremely difficult to adequately control motorized access in the Temagami area. The applicants are concerned that as a result of enforcement difficulties, motorized users may engage in illegal hunting and fishing (particularly in the habitat of the endangered aurora trout) and create their own trails off of existing roads.

Ministry Response

In March 2008, MNR denied the applicants' request for review, stating that the public interest does not warrant a review of the matters raised in the application. MNR explained that this decision is justified since the application requested a review of a very recent decision, and since the manner in which the park management plan was drafted was consistent with *EBR* requirements of public participation.

Furthermore, MNR stated that no new evidence was provided in the application that was not taken into account by MNR when the decision sought to be reviewed was made. MNR explained that because the prioritization of ecological integrity in section 3.1 of the *PPCRA* was considered during the management planning for Lady Evelyn-Smoothwater Provincial Park, it does not constitute new information or evidence not already considered. Similarly, MNR stated that the scientific information provided in the application regarding the impacts of motorized travel was either previously known to MNR staff or previously submitted by the applicant during the development of the park management plan.

ECO Comment

The ECO believes that MNR's decision to deny this review is reasonable. The Temagami Area Park Management Plan was approved just a few months before the application was received and the ECO believes that sufficient public participation was used in the drafting of the park management plan.

Furthermore, the ECO agrees with MNR that the prioritization of ecological integrity in section 3.1 of the *PPCRA* does not constitute new information not already considered by MNR during the park planning process. In addition to assertions by MNR that this principle was considered throughout the planning process and continues to be considered as the ministry implements the Plan, the ECO notes that the park management plan itself states that resource stewardship policies for the five parks "will ensure that the overall park objectives are achieved and that ecological integrity takes a priority in park operations and development." Moreover, the resource management plan for the Temagami conservation reserves (which was drafted by MNR at the same time as the park management plan) states that "in accordance with this new Act, it must be recognized that maintaining the ecological integrity for which specific conservation reserves were created is the first priority when planning and managing conservation reserves." These statements suggest that MNR was aware of and considered the priority of ecological integrity when approving the management plan for Lady Evelyn-Smoothwater Provincial Park.

The ECO also believes that the scientific evidence provided by the applicants in support of their application does not constitute new information not already considered by MNR. The applicants referred MNR to several of the same scientific references in a comment letter on the preliminary park management plan.

Other references included in the application were submitted by other commenters or produced by MNR itself. Statements in the preliminary draft and approved park management plan also suggest that MNR was aware of and considered the environmental impacts of mechanized travel on wildlife.

Although the ECO agrees with MNR's justification for declining this application for review, the ECO shares the applicants' concern regarding the permitting of mechanized travel in a wilderness class park (see section 4.21 of this Supplement for the ECO's review of MNR's Temagami Integrated Management Plans). Moreover, while the ECO believes that MNR considered the environmental impacts of mechanized travel and the *PPCRA*'s new priority of ecological integrity, the ECO believes that MNR gave greater priority to maintaining recreational activity in the area.

The ECO believes that one of the most significant threats to ecological integrity in the Temagami area is ATV, snowmobile, and motorboat travel in Lady Evelyn-Smoothwater Provincial Park since even limited motorized activity can have adverse ecological effects on wildlife. Furthermore, the ECO believes that travel by these means is inconsistent with the intent of wilderness class parks; several MNR policies and the park management plan itself state that a wilderness park is where "visitors travel by non-mechanized means and experience solitude, challenge and personal integration with nature." The ECO believes that the Temagami Area Park Management Plan should recognize that motorboat, snowmobile, and ATV travel are non-conforming activities in a wilderness class park and should phase them out over time.

In its response letter to the applicants, MNR stated that "the plan substantially reduces the areas where motorized travel is permitted to a small portion of the park area (approximately 5.5 per cent) within Access zones" and that "the park's ecological integrity will be enhanced by limiting motorized access to specific access zones within the park." The ECO points out that these statements are misleading, since limited motorized access is also permitted in parts of the park's wilderness zone. Furthermore, the ECO believes that the park management plan stretches the intended purpose of access zones. Rather than acting as small staging areas that provide access to other zones, many of the access zones in Lady Evelyn-Smoothwater Provincial Park cut deep into the heart of the park.

The potential impact of mechanized travel on wildlife in Lady-Evelyn Smoothwater Provincial Park warrants close monitoring by MNR. Therefore, the ECO intends to keep a watchful eye on MNR's park monitoring program to ensure that the Temagami area remains one of Ontario's special wilderness places for years to come. Moreover, the ECO looks forward to monitoring MNR's progress in exploring options for moving snowmobile trails out of this wilderness class park.

Review of Applications R2007027, R2007028, and R2007029:

Regulatory and Policy Reform Related to the Formation, Mobilization, Bioaccumulation and Biomagnification of Methylmercury in Ontario's Boreal Forest (Review Denied by MOE, MNR and MNDM)

This application was reviewed in conjunction with R2007027 (MOE) and R2007029 (MNDM). Please see section 5.2.18 under the Ministry of the Environment for the full review.

5.5 Ministry of Northern Development and Mines

Review of Application R2007020:

5.5.1 Review of the Need for a New Policy under the *Mining Act* (Review Denied by MNDM)

Background/Summary of Issues

In January 2008, applicants filed an application for review of the need for a new policy under the *Mining Act*, a statute administered by the Ministry of Northern Development and Mines (MNDM). The applicants wanted a policy that would increase environmental education and their application included as background, MNDM website information, MNDM fact sheets and frequently asked questions documents. The applicants allege that these resources do not adequately inform landowners of safety and environmental hazards, or prospectors of environmental protection measures to employ during exploration.

Ministry Response

The ministry provided its decision to deny the application on April 10, 2008. In its decision notice, MNDM outlined numerous ways in which it addresses environmental protection, as support for its decision to decline the review.

ECO Comment

The ECO will review the handling of this application for review in the 2008-2009 Annual Report.

Review of Applications R2007021, R2007022:

5.5.2 Review of the Need to Amend the *Mining Act* and the *Provincial Parks and Conservation Reserves Act* (Review Denied by MNDM and MNR)

Background/Summary of Issues

In January 2008, an *EBR* application was submitted requesting a review of the need to amend the *Mining Act* and the *Provincial Parks and Conservation Reserves Act*. The applicants were concerned that the existing legislative framework inadequately addresses the withdrawal of lands from mineral staking, particularly those lands that are ecologically significant. This application was forwarded to the Ministry of Northern Development and Mines (MNDM) and the Ministry of Natural Resources (MNR).

The applicants stated that the *Mining Act* should be amended immediately, before any other pending reviews of the legislation might occur. The applicants stated that amendments were needed forthwith to prevent "potential harm to the environment" and that the current system for withdrawing lands from mineral staking is prone to error. They stated, "There are several examples in previous ECO reports of poor information provided to the public and prospectors." As an example of their concerns, the applicants made reference to the issue of lands that were not withdrawn along the Attawapiskat River that prevented the creation of a provincial park along a 35 km stretch of this northern river.

A memorandum of agreement between Ontario and the federal government in the fall of 2007 was cited by the applicants as also illustrating the need to reform the *Mining Act*. This memorandum of agreement dealt with the proposed establishment of a National Marine Conservation Area by Parks Canada in western Lake Superior. This proposed transfer of control and authority to the federal government includes, according to MNR, "the lakebeds of Black Bay and Nipigon Bay, and encompasses over 10,000 square kilometres of Lake Superior lakebed as well as islands, shoals and some mainland." One of the stated purposes of the proposed National Marine Conservation Area is to protect the lakebed from mineral development. However, the applicants state that the lakebeds of all the Great Lakes were already protected from mineral development by an Order in Council in 1912. The applicants believe that this Order in Council is still in effect, yet MNDM's online claims mapping system does not show that the lakebeds of the Great Lakes are withdrawn from mineral staking, allowing for the risk of these areas being mistakenly staked for mineral development.

The applicants stated that a review of the *Provincial Parks and Conservation Reserves Act* was necessary. They stated that the law should be amended to grant the Minister of Natural Resources the authority to order the withdrawal of lands from mineral staking. To support their request, the applicants made reference to previous reports of the ECO that addressed this subject. The applicants specifically cited the Supplement to the ECO's 2006-2007 Annual Report that pertained to the *Provincial Parks and Conservation Reserves Act*:

> "The ECO believes that no dispositions or alterations of boundaries should be allowed for the purpose of circumventing the prohibited uses listed in the legislation. A long-standing criticism, voiced by many stakeholders over the past decade, is that protected areas may be used as "floating reserves" and that boundaries may be re-drawn to accommodate industrial activities such as mining. The ECO also believes that the new legislation should have given the authority to the Minister to order the withdrawal of lands from mineral staking for all candidate protected areas."

The ECO notes that the Premier stated in September 2007, "Many of the issues in developing a land use plan for the Far North relate to the *Mining Act*. The Act has not been updated for many years. In our next mandate, we will work with First Nations, industry, environment groups and other stakeholders to revise and modernize the *Mining Act*." In December 2007, the Premier also stated in the Ontario legislature, "We know we have to take a look at the *Mining Act* as well to ensure that it is updated and reflects the aspirations of a progressive society here in Ontario." In April 2008, the Minister of Northern Development and Mines also stated, "one of the things we are doing is undertaking a review of the *Mining Act*."

Ministry Response

Ministry of Northern Development and Mines:
In May 2008, MNDM denied this *EBR* application. The ministry states it has "taken action to resolve these isolated incidences" in which the lack of withdrawal orders has impaired the ability of MNR to regulate sites as protected areas. For example, the ministry states that the applicants' example of the lack of withdrawal orders preventing the establishment of a protected area along the entire course of the Attawapiskat river "is an anomaly, and not illustrative of a systematic failure of claim recording in Ontario." In this case, MNDM states that the necessary withdrawal orders were "imposed, but never fully documented" and "corporate memory of the withdrawal was lost." In regard to other areas that face similar conflicts, MNDM states that there has been an "ongoing attempt to resolve these issues."

MNDM states that there is no need to confer the authority to MNR to order the withdrawal of lands from eligibility from staking for ecologically significant lands or areas that are candidates to be regulated as protected areas. Indeed, MNDM states that the applicants' concern and the "rationale for this proposal is not clear." The ministry states that it has a "clear and distinct" mandate from MNR and that it is solely responsible for the administration of the *Mining Act*. MNDM states that "there is no reason to alter the mandates of MNDM or MNR with respect to the administration of mining lands or withdrawal orders."

The ministry confirms that the Great Lakes are withdrawn from mineral staking, based on the Order in Council from 1912. However, MNDM states that "due to technical limitations" with their online mapping database, the Great Lakes are not actually shown to be withdrawn from mineral staking. The ministry states that "as a technical compromise," members of the public accessing the online mapping database will now be provided with links that provide this information.

MNDM does acknowledge that it will be reviewing the *Mining Act*. The ministry states that the Premier, during the 2007 provincial election campaign, committed to "work with the mining industry, First Nation communities, environmental groups and other stakeholders to undertake a comprehensive and consultative review of the Act."

The ministry also notes that it will shortly "put in place a series of measures designed to allay concerns of Aboriginal communities, and provide guidance to industry and staff on the duty to consult." Additionally, MNDM states that a key element of this "transitional approach" is a pilot project that will enable the withdrawal of lands for the protection of significant cultural and burial sites of First Nations.

Ministry of Natural Resources:
In April 2008, MNR denied this *EBR* application as "the public interest did not warrant a review" and on the basis that it does not appear that there will be harm to the environment if a review is not undertaken. The ministry stated that the *Provincial Parks and Conservation Reserves Act* did not necessitate any amendments as it had undergone an extensive consultation process during its development and it had been recently enacted in 2006. Further, MNR stated that the *Mining Act* is not its legislative responsibility.

MNR stated that it did consider provisions for the establishment of interim "protected area reserves" during the recent process to update its protected areas legislation. However, the ministry felt that the "forest reserve" designation was sufficient for the withdrawal of lands from mineral staking. As such, MNR stated that a process to withdraw lands is already in place and that "measures have been implemented to improve this process." The ministry stated that the Minister of Northern Development and Mines does have the authority to withdraw lands under the *Mining Act*.

ECO Comment

The ECO is troubled that MNDM denied this *EBR* application and, yet, the ministry will shortly be reviewing the *Mining Act* as directed by the Premier. The ministry made no mention of considering the applicants' concerns in this forthcoming review. The ECO concurs with MNR's rationale for not undertaking this review, although the ECO does not agree that the current system for withdrawing lands from mineral staking is adequate.

The ECO does not share MNDM's position that the failure to adequately withdraw lands from mineral staking has been a series of anomalies or isolated incidences that were not illustrative of a systematic problem. The ECO notes that it raised concerns about the need for legislative reform in our 2006-2007 Annual Report. In that report, the ECO recommended that MNDM "reform the *Mining Act* to reflect land use priorities of Ontarians today, including ecological values." Further, the ECO has extensively commented on the problems of mining disentanglement, noting in that same report "that lands should be withdrawn from staking when MNR identifies them as candidates for protection. Conflicts such as these are mainly attributable to the disjunction between laws, such as the *Public Lands Act* administered by MNR to manage Crown land, and laws such as the *Mining Act* administered by MNDM to facilitate mineral development."

The lakebeds of the Great Lakes and some major rivers were withdrawn from staking for mineral development by an Order in Council in 1912. It states that Lake Superior, St. Mary River, Lake Huron (including Georgian Bay), the St. Clair River, Lake St. Clair, the Detroit River, Lake Erie, the Niagara River, Lake Ontario, the St. Lawrence River, and Lake Nipissing are withdrawn from mineral staking. This Order in Council remains in effect today. The ECO agrees with the applicants that such an environmentally significant directive should be explicitly reflected in the main law governing mineral development in Ontario.

Review of Applications R2007027, R2007028, and R2007029:

Regulatory and Policy Reform Related to the Formation, Mobilization, Bioaccumulation and Biomagnification of Methylmercury in Ontario's Boreal Forest

(Review Denied by MOE, MNR and MNDM)

This application was reviewed in conjunction with R2007027 (MOE) and R2007028 (MNR). Please see section 5.2.18 under the Ministry of the Environment for the full review.

Review of Application R2007030:

5.5.3 Request to Regulate Wolf Lake Old Growth Forest Reserve as a Protected Area

(No response from MNDM in 2007/2008)

Background/Summary of Issues

In January 2008, an application for review was filed requesting that Wolf Lake Old Growth Forest Reserve be regulated as a protected area under the *Provincial Parks and Conservation Reserves Act, 2006* (*PPCRA*). Alternatively, the applicants requested that the Ministry of Natural Resources (MNR) find a comparable contiguous area of red pine old growth in the immediate area. Wolf Lake Old Growth Forest Reserve is adjacent to Chiniguchi Provincial Park.

In 1999, MNR released Ontario's Living Legacy (OLL) Land Use Strategy, which recommended the creation of 378 new protected areas on Crown lands in Ontario. It was later revealed, however, that 66 of these proposed protected areas (including Chiniguchi Provincial Park) either had mining claims when they were proposed or there were mining claims staked before MNR requested that the Ministry of Northern Development and Mines (MNDM) remove the areas from staking. In 1999, lands within Chiniguchi Provincial Park that overlapped with existing mining lands were designated as forest reserves, one of which is Wolf Lake Old Growth Forest Reserve. Chiniguchi Provincial Park was regulated in 2006 under the *PPCRA*.

In 2005, MNR indicated that it intended to remove the forest reserve designation for land in Wolf Lake Old Growth Forest Reserve, re-designate the area to a general use area or enhanced management area, and seek replacement areas. MNR has begun pre-consultation with stakeholders in an effort to seek consensus for the disentangelement proposal to remove the reserve's land use designation and seek suitable replacement lands.

The applicants state there is a need for a review because Wolf Lake Old Growth Forest Reserve was recognized under Ontario Living Legacy and has "international significance as the largest contiguous red pine old growth forest – arguably in the world." Therefore, the applicants believe that the province must do everything in its power to "remove the threat of mining activity from the reserve and ensure its regulation as a protected area."

The application was sent to both MNR and MNDM. Although the ECO initially sent MNDM the application as a non-prescribed review in January 2008, the ministry subsequently requested the opportunity to officially consider the application in a preliminary way. As a result, the 60-day period for MNDM to consider this application began on February 26, 2008, approximately five weeks after the application period had commenced for MNR.

Ministry Response

As of May 2008, the applicants and the ECO are awaiting MNDM's response.

ECO Comment

The ECO will review this application in our 2008-2009 Annual Report.

SECTION 6

ECO REVIEWS OF APPLICATIONS FOR INVESTIGATION

SECTION 6: ECO REVIEWS OF APPLICATIONS FOR INVESTIGATION

6.1 Ministry of the Environment

Review of Application I2006007:

6.1.1 Alleged Contravention of the *EPA* by an Auto Body Shop in Windsor (Denied by MOE)

Background/Summary of Issues

In December 2006, an application for investigation was filed that alleged the contravention of section 14 of the *Environmental Protection Act* (*EPA*) by an auto body shop in Windsor, Ontario. The applicants also alleged the contravention of the Ministry of the Environment's (MOE) "Guideline D-1, Land Use Compatibility" and "Guideline D-6, Compatibility Between Industrial Facilities and Sensitive Land Uses." Further, the applicants stated that the auto body shop was operating without a Certificate of Approval (C of A) as required by section 9 of the *EPA* and that it was non-compliant with a Provincial Officer's Order issued by MOE.

The applicants included a copy of MOE's guidelines with their application. The applicants acknowledged that "Guideline D-1, Land Use Compatibility" is primarily intended for planning purposes for new developments, but they stated that this guideline has a specific provision to address existing land use incompatibilities. This guidelines states, "When there is a compatibility problem where both land uses already exist, matters may be subject to ministry abatement activities if there is non-compliance with a ministry issued Certificate of Approval (C of A) for the facility, or there is no C of A in place."

This *EBR* application is directly related to a previous application for investigation (I2006001) that was filed by the same applicants in June 2006. This first *EBR* application was reported on in the ECO's 2006-2007 Supplement (pages 227-229). The first application for investigation alleged contraventions of the *EPA* and the applicants were concerned that the auto body shop was illegally discharging airborne chemicals and causing excessive noise. The applicants also were concerned about potential health impacts, as well as claiming that they suffered the loss of enjoyment of their property. In October 2006, MOE denied this first *EBR* application, but the ministry did issue two separate Provincial Officer's Orders requiring that the owner of the facility have a consultant's report on noise and odour emissions prepared, apply for a C of A, and register a requirement for a C of A for the paint spray booth on the property's title.

In November 2006, MOE apparently informed the applicants that the auto body shop was now going to be applying for a C of A for its operations. The applicants expressed frustration to the ECO that MOE might grant a C of A despite the fact that the auto body shop was under investigation by the ministry for non-compliance with a Provincial Officer's Order.

In March 2007, a numbered company – not named in either the original *EBR* application or in MOE's Provincial Officer's Orders – applied for a C of A to operate a paint spray booth at the site in question. The proposal notice on the Environmental Registry provided few details, other than stating that an application had been submitted "to operate one (1) automotive paint spray booth, equipped with dry-type exhaust filters for overspray control, for the application of solvent-based refinish coatings to repair auto body components and complete vehicle. The spray booth discharges solvent vapours to the atmosphere through one (1) roof-mounted exhaust stack."

In January 2008, MOE issued a C of A for the paint spray booth. The C of A contains 11 terms and conditions relating to odour control measures, operation and maintenance, record retention, notification of complaints, and performance. For example, the C of A requires that the auto body shop develop a complaint response procedure for logging odour complaints from the neighbouring public and detailing the actions taken in response, in addition to notifying MOE within two business days of any complaint. Further, the auto body shop is restricted in using the spray paint booth to between the hours of 7:00 a.m. and 7:00 p.m. and impulsive noise emissions (i.e., hammering) are restricted to the hours of between 9:00 a.m. and 5:00 p.m. The north garage doors of the auto body shop also must be closed when non-impulsive noises (e.g., hoist, air gun / ratchet, air compressor, grinding tool) are in use.

Ministry Response

In April 2007, MOE denied this application for investigation. MOE stated that ministry staff "have attended the site numerous times since the issuance of the Provincial Officer's Order, and have not observed nor verified the conditions reported in the complaints of odours and noise emissions from the auto body shop." The ministry also stated the paint spray booth at the auto body shop was no longer in operation as of the summer of 2006.

MOE acknowledged that the owner/operator was non-compliant with the Provincial Officer's Order issued in June 2006 that required a noise assessment be completed by August 2006. The ministry stated that this non-compliance was referred to its Investigations and Enforcement Branch, which conducted an investigation. MOE stated that "the owner of the facility has made arrangements for the submission of an application for Certificate of Approval (Air) to the ministry's Environmental Assessment and Approvals Branch, which will address both the booth and noise emissions from the operation."

MOE stated that "Guideline D-1, Land Use Compatibility" and "Guideline D-6, Compatibility Between Industrial Facilities and Sensitive Land Uses" are not prescribed instruments under the *EBR* and, therefore, it would not consider this particular issue. The ministry stated that these particular guidelines "are used for planning purposes only and were not designed to address existing land use conflicts that may have been in existence prior to the development of the guidelines. Guideline D-1 and D-6 would be used in this situation only if there was a new application for land use, for instance, changing the zoning bylaw for the paint spray booth from its existing use to a new use."

ECO Comment

The ECO agrees with MOE's decision to deny this particular application, but the ECO has concerns with how slowly the ministry dealt with the long-standing issues held by the applicants. The applicants likely filed this *EBR* application out of frustration, due to a perceived lack of action on the part of MOE in enforcing its own Provincial Officer's Order that was a result of the applicants' first *EBR* application.

In both *EBR* applications, the applicants raised valid issues about the transparency of how the ministry addressed their concerns. MOE acknowledged that there was non-compliance with a Provincial Officer's Order, but that any concerns that the applicants held would be resolved when a decision was made on the issuance of a C of A. It is unfortunate that the applicants were given so little assurance that the situation would be resolved that they felt compelled to file a second *EBR* application in order to find resolution to their initial application. Moreover, as reflected in the 2006-2007 Supplement with respect to the first *EBR* application, "but for the dogged perseverance of the applicants, the ECO believes that many of the actions taken by MOE would not have occurred."

The successful outcome of this application – a new C of A with numerous terms and conditions to address odours, noise, and complaints responses – demonstrates that the *EBR* can be an effective tool to address site-specific environmental concerns. However, it remains to be seen whether these conditions will be adequately enforced.

This *EBR* application also demonstrates a trend in how MOE addresses concerns related to the application of the *Environmental Protection Act*. The ECO appreciates that the ministry may not always seek to investigate an administrative violation and it supports MOE's decision to use voluntary abatement where appropriate. However, there must be some sort of backstop when this voluntary approach to compliance appears to not be working. Without an adequate explanation to the applicants with regard to the ministry's delay in resolving the issue of a C of A and the perceived lack of enforcement of its own

Provincial Officer's Order, MOE's apparent leniency in this case fails to provide the public with confidence that the province's environmental laws are being enforced.

Review of Application I2006009:

6.1.2 Alleged Contravention of Section 9 of the *EPA* by a Crematorium (Investigation Denied by MOE)

Geographic Location: Burlington (South-western Ontario)

Background/Summary of Issues

On January 19, 2007, two applicants requested an investigation by the Ministry of the Environment (MOE) of a crematorium in Burlington. The applicants alleged that the crematorium was illegally operating one of its three cremators without a Certificate of Approval (C of A) for air emissions, contrary to section 9 of the *Environmental Protection Act* (*EPA*). The applicants also raised concerns that the crematorium, which is located adjacent to a residential area, is emitting smoke, odour and ash into the air, potentially compromising the health of area residents and the environment.

To support their application, the applicants included a large package of documents relating to the crematorium that had been obtained from MOE through a Freedom of Information request. The package included copies of 26 public complaints regarding smoke, odour, and ash from the crematorium, logged between 2001 and 2004, as well as 80 notifications of process upsets from the crematorium received by MOE during that same period.

General Issues Relating to Crematoria:
The issue of crematoria operating near residential communities is a matter that has frequently been brought to the attention of the ECO over the years. Crematoria often spark major public concern and opposition because of the very nature of their operation. For example, the majority of people tend to be highly sensitive to odours from crematoria, even at the barely detectable level, because of the nature of the odour's source. Furthermore, crematoria are unusual to the extent that they may operate for decades without ever altering their operations. Accordingly, many crematoria in the province may be operating with either no C of A at all or a C of A that is significantly outdated.

Ministry Involvement in this Case Prior to the Application for Investigation:
In December 2001, in response to numerous complaints from the public regarding smoke emissions from the crematorium, MOE conducted an inspection of the company's operations. The ministry concluded that the complaints likely related to the operation of the company's cremator no. 2. According to MOE, these problems were resolved in 2003, and after the improvements were made, there was a marked decline in public complaints and company notifications.

In addition, during the inspection, MOE discovered that the company's cremator no. 3 had been altered approximately two years earlier. The company's three cremators had all been installed and operating since the 1960s. As the cremators predated the requirements in section 9 of the *EPA*, they did not require a C of A. However, as cremator no. 3 had been recently altered, it now required a C of A. The company had not yet applied for a C of A for this cremator.

On January 9, 2002, following the inspection, MOE issued an order to the company requiring it to apply for a C of A for its cremator no. 3. In March 2002, the company submitted an application for a C of A to the ministry. The C of A was posted on the Environmental Registry for 30 days, but no public comments were received. On February 26, 2007, almost five years after MOE received the application for a C of A, MOE issued a C of A to the crematorium.

Ministry Response

The ministry concluded that an investigation by MOE was not required because the ministry had already conducted and completed an investigation of the alleged contravention. The ministry stated that it conducted an inspection in December 2001, and has since addressed all of the concerns raised by the applicants. MOE also explained that the earlier problems causing the smoke, odour and ash emissions were investigated by the ministry and resolved in 2003. MOE noted that complaints regarding emissions have not been an issue since 2003. The ministry further stated that it is not aware of any concerns relating to adverse affects to the environment or human health. In addition, the company obtained a C of A for cremator no. 3 in February 2007, and now satisfies the requirements of section 9 of the *EPA*. Accordingly, MOE concluded that there are no ongoing violations for MOE to investigate.

With respect to past violations (i.e., the operation of a cremator without a C of A from approximately 1999 to February 2007), MOE's response suggests that ministry staff did not wish to pursue this "administrative violation." MOE explained that the company did comply with its 2002 order to submit an application, and that the ministry never ordered the company to cease operating while the application for the C of A was being reviewed by MOE.

The ministry allowed the company to continue to operate while the C of A was being processed because it felt that there were no indications of any adverse effects to the environment or human health. MOE stated that during the technical review of the C of A application, the crematorium provided theoretical modeling estimates demonstrating that the emissions of potential contaminants from the cremator met the ministry requirements. MOE therefore concluded that, assuming normal operation, the cremator would not discharge emissions that would cause an adverse effect to either the environment or human health.

MOE further explained that the five-year delay between receiving the application and issuing the C of A was on account of ongoing discussions between MOE and the company regarding the requirement to install suitable monitoring equipment. MOE attached standard performance and operational requirements to the C of A, including conditions that require the crematorium to add a continuous emission monitoring system and a source testing program. MOE stated that these monitoring and testing requirements are designed to confirm that the emissions from the crematorium meet the ministry standards. However, for a number of reasons (including the unique stack configuration of the cremator), the company apparently required extensive time to find suitable monitoring equipment. The crematorium finally found suitable equipment in early 2007, and the C of A was issued on February 26, 2007. The C of A requires the crematorium to install the monitoring system by December 2007.

ECO Comment

The ministry's decision not to investigate was reasonable. The allegations raised by the applicants, and the evidence supporting those allegations, all relate to past violations (i.e., prior to 2004) that seem to have been resolved. The smoke, odour and ash emissions appear to have lessened significantly, as indicated by the reduction in public complaints and company notifications over the past few years. In addition, the company has now been issued a C of A. Accordingly, there do not appear to be any ongoing violations that require investigation.

However, the ECO is concerned about MOE's failure to adequately address the unusually long (five year) period in which MOE allowed the company to operate the cremator without a C of A. The only explanation for the delay provided by MOE in its response to the applicants is: "The company expressed difficulties in complying with the monitoring requirements for a number of reasons including the unique stack configuration of cremator no. 3."

Without the benefit of a more detailed explanation, five years to merely find a suitable monitoring system seems unreasonably long. (This five-year period was used only to identify a suitable system; MOE has allowed the crematorium an additional nine months to install the system.) While the decision to turn down the application for investigation may be reasonable, the applicants should have been provided with a more thorough explanation for the seemingly unreasonable delay.

This case, however, does seem to suggest that public involvement does get action. Not only did the public complaints in 2001 prompt MOE to inspect the crematorium, it appears that this *EBR* application may have spurred MOE to finally issue the C of A. It is interesting to note that the C of A was issued very shortly after the applicants contacted MOE, made a Freedom of Information request, and filed this *EBR* application. One is left to wonder: how long might it have taken MOE to issue the C of A had the applicants not taken an interest in this case?

The ECO appreciates that the ministry may not wish to investigate an administrative violation, and supports MOE's decision to use voluntary abatement where appropriate; however, there must be some sort of backstop when this voluntary approach appears to not be working. Without an adequate explanation for the extensive delay in obtaining the C of A, the ministry's apparent leniency in this case fails to provide the public with confidence that the ministry's environmental laws are being enforced.

Review of Investigation I2006010:

6.1.3 Alleged Contravention of the *Environmental Protection Act* and the *Ontario Water Resources Act* in Algonquin Provincial Park

(Investigation Denied by MOE)

Background/Summary of Issues

In January 2007, the applicants filed an application for investigation under the *Environmental Bill of Rights* (*EBR*) alleging the contravention of the *Environmental Protection Act* (*EPA*), the *Ontario Water Resources Act* (*OWRA*), and the federal *Fisheries Act*. The applicants alleged that Canadian National Railway (CN) has contravened the aforementioned statutes as a result of contamination from its rail right-of-way through Algonquin Provincial Park. This rail right-of-way is owned by CN and it is not regulated as part of Algonquin Provincial Park. The applicants included a broad array of supporting material with their application, including their previous correspondence with the Department of Fisheries and Oceans (DFO), Environment Canada, Transport Canada, the Ministry of the Environment (MOE), the Ministry of Natural Resources (MNR), the Commissioner of Environment and Sustainable Development (CESD), and the Environmental Commissioner of Ontario (ECO).

The applicants raised many environmental concerns about this rail line that is no longer in use, including alleged heavy metal contamination in slag used for the rail bed, rail trestles built with creosote-preserved wood, abandoned culverts that could impact fish habitat, and possible hydrocarbon contamination of soils and waters.

The CN rail line transects the northeastern portion of Algonquin Provincial Park and its construction was completed in 1915. The rail line cuts through the park for 127 km, covering approximately 503 hectares. According to MOE, CN abandoned the use of this section of rail line in 1996. It is MNR's intent that this land be added to Algonquin Provincial Park if the Crown acquires this land in the future.

In 1996, MNR released its proposed "Algonquin Provincial Park: North/East Study - Background Information and Options Report." In part, the ministry developed this options report to address issues associated with the abandonment by the CN rail line. In 2005, MNR decided not to proceed with this options report.

This request for investigation is the second *EBR* application filed by the applicants with regard to this issue. MOE denied the previous application in 2001 on the basis that it was unlikely that sufficient evidence existed to demonstrate that a contravention of the *EPA* or the *OWRA* had occurred, and that the ministry was not responsible for the enforcement of the federal *Fisheries Act*. The applicants, along with several other organizations, also have submitted numerous petitions to the federal Commissioner of the Environment and Sustainable Development that have involved the Department of Fisheries and Oceans, Environment Canada, and Transport Canada.

Ministry Response

In April 2007, MOE denied this *EBR* application as it would duplicate an ongoing ministry investigation. Further, tne ministry explained that remediation work is currently being undertaken by CN. The ministry stated that it "has been attempting to obtain information from CN on a voluntary basis since 2004 to verify whether some aspects of the abandoned railway line could be having an impact on the environment." Further, in June 2006, MOE stated that CN has committed to a cooperative process with the ministry to assess potential impacts. In February 2007, CN submitted a report to the ministry that reviewed previous investigations, including fieldwork that was carried out in 2006. Based upon all the available information, MOE stated that there is "no evidence of impact to the environment or that any immediate clean-up action is required."

In its response, MOE noted that it is not responsible for the enforcement of the federal *Fisheries Act*. The ministry did inform the Department of Fisheries and Oceans that it had received a request to investigate an alleged contravention. In its response to the applicants, MOE extensively detailed the previous investigations conducted by both DFO and Environment Canada related to the *Fisheries Act*.

MOE provided a detailed response to the applicants related to the *EPA* and the *OWRA*, including how their concerns were addressed in previous investigations of the site. The ministry also described which aspects of their concerns were currently under investigation by MOE and, therefore, did not warrant a new investigation. MOE is investigating possible chemical pollution related to the historical use of petroleum products along the rail line and whether there might be an impairment of water quality.

The applicants did provide data from surface water samples that were taken in 2003. MOE stated that it was "not previously aware of these data and had not received copies of these results in the past." According to the applicants, the results from this data exceed the Provincial Water Quality Objectives for aluminium, arsenic, cadmium, cobalt, copper, nickel, lead, and zinc. MOE stated that the lab where the testing occurred is not accredited, but that the ministry will assess this information and take appropriate action if warranted.

ECO Comment

The ECO concurs with MOE and its decision to not undertake this investigation. The ministry already is working with CN to determine if any additional remediation work is needed. MOE stated that should its ongoing review provide "sufficient basis for requiring CN to undertake any additional investigation and/or clean-up activities, the ministry will expect CN to fulfill its legal responsibilities and will ensure that CN takes appropriate actions to help ensure the environment of the park is protected." The federal government also has actively responded over the years to concerns raised by the applicants about the abandoned rail line. However, although the decommissioning of this rail-line is not a high priority for MOE, the ECO does have concerns about the length of time that this process has taken. The ECO believes that MOE should apprise the applicants of any future findings or actions by the ministry with respect to their investigation to ensure transparency and accountability.

The ECO believes that this rail right-of-way would make a valuable addition to Algonquin Provincial Park if these lands revert to Crown ownership. The acquisition of these lands would assist the Ministry of Natural Resources in maintaining and restoring the ecological integrity of Algonquin Provincial Park.

Review of Application I2006011:

6.1.4 Alleged Contravention of *EAA* (Obligation to Consult) re: Bradford STP Investigation Denied by MOE

Background/Summary of Issues

In February 2007, two applicants submitted an application for investigation to the Ministry of the Environment (MOE). They were concerned that they were denied the opportunity to participate in consultations on a sewage treatment plant expansion because they believed that the expansion did not include their hamlet of Bond Head.

Bond Head, located 30 kilometres north of Toronto in Simcoe County, is a quiet rural hamlet with approximately 500 residents. The Town of Bradford-West Gwillimbury (the "Town"), Bond Head and the surrounding area are experiencing intense pressure to develop. In 2003, a controversial large-scale development project, covering 2,500 hectares and accommodating 114,000 people, was proposed by a development corporation to urbanize the lands between Bond Head and Bradford. Bond Head would see its population grow to 4,400. The proposal also called for a Servicing Master Plan in collaboration with the Town to address water and sewer servicing solutions for the Bradford and Bond Head areas.

In their application, the applicants alleged that the Town contravened the Class Environmental Assessment ("Class EA") provisions of the *Environmental Assessment Act (EAA)* with respect to its proposed expansion of the Bradford sewage treatment plant ("STP"). These provisions include an obligation to consult with interested persons. The applicants asserted that the Town intends to enlarge its plans for the STP expansion to include the rural hamlet of Bond Head, located six kilometres west of Bradford but the Town failed to include the Bond Head expansion in their environmental assessment process. By not including Bond Head in the Class EA, the applicants stated the Town did not properly consult with the residents of the hamlet of Bond Head as required under the *EAA*.

The *EAA* sets out a decision-making process for project proponents to ensure that all environmental impacts of a project are considered and any negative effects are mitigated prior to the project's implementation. The Class EAs are designed to streamline the process for certain groups of projects with shared, predictable effects. The Town's STP is covered by Schedule C of the Municipal Class EA, which is the category for undertakings with the potential for significant environmental effects. Schedule C projects are required to follow the full planning and design process. These projects require the production of an Environmental Study Report ("ESR") that compiles all information that must be available for review by the public. The process has built in mandatory public consultation points. Under the Municipal Class EA process, a person with concerns at the conclusion of the planning process may request that the Ontario Minister of the Environment review the status of the project.

The Town undertook a Class EA to increase the size of the Bradford STP for the approved Official Plan Urban Service Area of Bradford. The Town's Class EA process did not cover Bond Head. The applicants allege that they did not believe they needed to comment on the STP expansion because documents stated that Bond Head was excluded from the Class EA. The affected residents of Bond Head stated they were not informed of plans to include Bond Head in the proposed expansion or of the environmental implications of the proposed expansion on their community. Subsequent decisions by the Town alerted the applicants that the Town was planning to include Bond Head in the STP expansion. The applicants are concerned about the phosphorus loading from the wastewater discharged from the expanded STP into the Holland River, and the impacts on the water quality of the Nottawasaga River watershed and Lake Simcoe watershed, which is already phosphorus-stressed.

A public information centre was held in January 2005, for the Municipal Class EA process for the Bradford STP. The applicants stated that the documents provided at the centre clearly declared that the session was for the Official Plan Urban Service Area of Bradford. In other words, the STP expansion was for the area that does not include Bond Head. Furthermore, the applicants noted that Bond Head was mentioned in the ESR, which stated "new development would be required to provide a community based wastewater treatment facility, separate from services in the existing urban development area." The applicants and other Bond Head residents relied on this statement and believed that Bond Head would not be affected by this particular expansion and therefore did not necessitate their comment on the *Class EA*.

However, in May 2005, and June 2005, the Town passed a by-law and signed an agreement worth $5.4 million with a development corporation to provide the STP with additional sewage treatment capacity to service the hamlet of Bond Head and the area in between the Town and the hamlet (Highway 400/88 Special Policy Area) in the event that the Town determined that the Bradford STP was the best means to service all or part of these areas. There was no opportunity for the public to comment on this agreement. A new Class EA for Bond Head was not planned.

The applicants also allege that the Town is planning to expand the STP by 2,000 m^3/day in excess of the capacity approved in the Certificate of Approval (C of A) issued to the Town in May 2006. The May 2006 C of A allowed the Town to expand the STP from 7,400 m^3/day in two stages to 17,400 m^3/day, which would cover service for the urban centre but not the additional area covered by the Bond Head agreement.

In February 2007, the Town council approved a contract with a construction company to complete both stages of the STP expansion and indicated that the development corporation would be formally advised of the tender results, and its Letter of Credit would be drawn up as per their agreement. The applicants submitted the report from the Town outlining this transaction with their application.

The applicants also stated that according to a local newspaper editor, the development corporation was paying $6.1 million of the $7.3 million of the STP expansion costs, although they do not own any property in urban Bradford. The Town's Notes to the Consolidated Financial Statements as at December 31, 2005 also state under paragraph 12 (b) "During the year, the Town entered into an agreement to expand the sewage treatment plant beyond what was outlined in the Environmental Study Report dated February 2005. This agreement will provide additional sewage allocation in the special policy area at Highways 88 and 400 and the Bond Head expansion area. A letter of credit for $6.7 million is held by the Town regarding this project."

Ministry Response

In May 2007, MOE denied the Application for Investigation because the ministry did not find that the Town provided service outside the approved service area outlined in the Class EA. MOE considered sub-section A.1.2.3 of the Municipal Class EA to assess whether the Town had breached the Class EA in contravention of the *EAA*. If the Act was contravened, the Town would be subject to section 38 of the *EAA*, which deals with offences and penalties.

MOE did note that on March 2005, the Town completed the Class EA to increase the size of the STP in two stages to accommodate growth in its approved service area. MOE also confirmed that the STP's Class EA does not provide for service to the hamlet of Bond Head by noting that the ESR defined the service area as the OMB-approved Urban Boundary for the Town of Bradford.

However, based on the evidence provided in the application, the ministry did not conclude that the Town provided service outside the approved service area as outlined in the Class EA. The ministry stated that "While actions by the Town may suggest an expansion to the [STP] service area in the future, insufficient evidence was provided that the expansion of the service area had taken place."

In its decision letter to the applicants and the Town, MOE clearly stated that if the Town proceeded with the expansion to include Bond Head, additional public consultation requirements under the Municipal Class EA would be required, and the Town must:

- Complete an addendum to the completed ESR to revise the current service area to include Bond Head or BPI development lands and redistribute the available capacity of 17,400 m^3/day from an expanded WPCP; or
- Complete a new Municipal Class EA to expand the service area of the plant to include Bond Head or BPI development lands and redistribute the available capacity of 17,400 m^3/day from an expanded WPCP; or
- Complete a new Municipal Class EA to expand the service area of the WPCP and expand the capacity of the WPCP to accommodate Bond Head or BPI development lands; and,
- Obtain approvals required under the *Ontario Water Resources Act* for any works required to expand the existing service area of the WPCP.

The ministry also noted that if the Town decides to increase the capacity of the STP beyond 17,400 m^3/day, it would be required to make an application to the ministry to amend its C of A and satisfy any Municipal Class EA requirements.

ECO Comment

The ECO believes that the MOE decision was reasonable. The ministry examined the *EAA* and the Municipal Class EA, and considered the applicants' allegations and the evidence included in their application. MOE explained its reasons in clear language and sufficient detail. However, the ECO notes that this application reveals concerns regarding the environmental assessment process.

MOE clearly articulated that if the Town actually proceeds to expand the STP area beyond the approved service area it must include Bond Head into the Class EA process and apply for an amendment to its C of A. This addressed the main concerns outlined by the applicants. According to MOE, the affected residents will have an opportunity to participate in public consultations related to Bond Head when the Town commences the STP expansion. MOE's decision also affirmed that the Town must comply with the requirements outlined by the Municipal Class EA or they may be found to have committed an offence (i.e., breach of the EA approval) and subject to fines under the *EAA*.

This application raised questions regarding what MOE deems to be the actual commencement of a project under the *EAA*. One may argue that a project commences when the shovel breaks ground on a project, while others would argue that this would constitute one of the end points of the project. The applicants believed that the expansion project commenced when the Town entered into agreements with companies who will oversee the project. The Notes to the Consolidated Financial Statement indicate the Town's intention to expand the STP to include Bond Head. The ECO believes based on evidence that MOE could have concluded that the expansion of the STP project commenced when the intention was formed and contracts were entered into.

In a related matter, MOE's decision did not specify what action would trigger the requirement for a new Class EA for Bond Head. It could conceivably be a public announcement by the Town announcing the proposed expansion any time prior to the actual construction of the expansion project – after numerous critical (and possibly irreversible) decisions have been made already. The ECO cautions that once contracts have been entered into, prior to a Class EA being conducted, the outcome of a Class EA will tend to favour the project over environmental considerations. Moreover public input will not be given the full weight it is owed, thereby undermining the purposes of the *EAA*. This is particularly true in this situation where the expanded sewage treatment plant is necessary for the proposed controversial large-scale urban development to succeed. Since the Town has demonstrated its intention to include Bond Head in the STP expansion, the ECO encourages the Town to undertake a Class EA for Bond Head sooner rather than later – when critical decisions are already made.

The ECO also notes that there is significant local opposition to the proposed large-scale development project, which would drastically change the nature of the Bond Head community.

In such situations, sewage infrastructure expansions can set the stage – perhaps irrevocably – for development to proceed, and local residents deserve opportunities to fully participate in such decisions.

Review of Application I2006012:

6.1.5 Alleged *EPA*, Section 14 and *OWRA*, Section 30 Contravention, re: Contaminated Soil Disposal

(Investigation Denied by MOE)

Background/Summary of Issues

In March 2007, the applicants filed an application for investigation with the Ministry of Environment (MOE) alleging contraventions of the *Environmental Protection Act* (*EPA*) and *Ontario Water Resources Act* (*OWRA*). Before filing the application, one of the applicants wrote a letter to the Minister of Environment in March 2007. Both the letter and application asserted that a local developer failed to remove mercury-contaminated soil from property being redeveloped. Rather, the applicants claimed they witnessed the developer re-bury the contaminated soil that was excavated from the property. The applicants also contend they saw contaminated rainwater being pumped out of the crater and into a storm sewer. The applicants were troubled that the media allegedly misreported that the contaminated soil was removed from the site, and were concerned over the potential health impacts of mercury contaminated soil, water and air on nearby residents.

One of the applicants stated that on May 2006, he witnessed and photographed the developer using industrial equipment to dig a large crater on a site along 344 Glendale Avenue (west of Merritt Street) in the City of St. Catharines. The soil and rock was piled into two large mounds on the site.

An article in a local newspaper stated that the property owner excavated 180 truckloads of soil contaminated with industrial chemicals. The excavation took place on a former industrial site. The soil was reported as being sent to a landfill site at a cost of $200,000. The applicants noted in their application that they contacted the private waste facility mentioned in the newspaper article and were informed that the facility was not equipped to handle mercury-contaminated soil.

Several days after the newspaper article was published, one of the applicants returned to the site with a camera and photographed large dump trucks being filled with the contaminated soil and then dumping the soil back into the excavated site on the property. Bulldozers also pushed the mounds of soil into the crater. On a separate occasion, after it had rained, the same applicant also photographed water being pumped out of the crater and onto the property. The applicant noted that the water was yellow and had a pungent smell.

The remediation of the property was reportedly conducted in April and May of 2006 and documented in a September 2006 report prepared by an engineering firm, presumably for the owner. The report confirmed the presence of elevated heavy metal contamination at the site and stated that contaminated soil was disposed of at a private landfill site.

The applicants allege that section 14(1) of the *Environmental Protection Act* (*EPA*) and section 30(1)(2) of the *Ontario Water Resources Act* (*OWRA*) were contravened by the developer. Section 14(1) of the *EPA* prohibits any person from discharging, or causing or permitting the discharge of a contaminant into the natural environment that may cause an adverse effect. Section 30(1) makes it an offence for any person to discharge or permit the discharge of any material into waters or on any shore or bank or in any place that may impair the quality of any water. Where a discharge occurs, the person responsible must immediately notify MOE.

Ministry Response

In a letter sent in June 2007, MOE denied the application for investigation. The reason for the denial was "that an equivalent investigation is currently ongoing and further investigation is not warranted."

MOE explained that upon receiving the applicant's March 5, 2007 letter, MOE staff conducted a site inspection on March 13, 2007. That inspection did not reveal "any visual evidence of contamination" on or off the property. MOE stated that ministry staff were reviewing the engineer's report to assess whetner "appropriate scientific approaches and assumptions were used."

MOE relied on section 77(3) of the *Environmental Bill of Rights (EBR)*, which provides ministries with the discretion not to duplicate an ongoing investigation. MOE determined that the allegations in the March 5 letter were being investigated and they were very similar to the allegations in the application for investigation received by the ministry on April 10. As such, MOE concluded there was an equivalent investigation currently underway, and another investigation was not necessary. The ministry stated that the evidence submitted with the application, along with the material previously provided, would be used in its investigation.

Although the applicants provided photographs of pumps and hoses on the property, MOE felt there was "no direct evidence supporting the contention that contaminated water was pumped to a storm sewer or that mercury vapour was emitted to air." These allegations would be investigated further. MOE also intends to request additional information from the developer regarding the disposal of contaminated materials from the property.

MOE anticipated that the review and follow-up would be completed in three months and stated it would contact the applicants to arrange a meeting to review the findings. At this time, the ECO is still awaiting the outcome of the review.

Lastly, MOE noted that if the property's land use changes to a more sensitive use, the owner must comply with the requirements set out in the Brownfields regulation. MOE noted that at the time its decision was rendered, a Record of Site Condition was not filed on the ministry's Environmental Registry in accordance with O. Reg. 153/04. The ministry also noted that the City of St. Catharines had not as yet redesignated the property to a more sensitive land use.

ECO Comment

After reviewing both the letter to MOE and the application for investigation, the ECO believes that MOE's reason for denying this application appears to be valid. Given that MOE had already commenced an investigation of the allegations contained in the letter, it was reasonable for the ministry to rely on section 77(3) of the *EBR* in deciding not to duplicate an ongoing investigation. The application and the letter contained the same allegations and MOE stated it would use the evidence provided in the application in its ongoing investigation.

The applicants seemed to have filed this application partly in frustration over what they perceived to be a lack of government action on this matter by various levels of government. It is unclear whether MOE informed the applicants of its preliminary investigation before the applicants filed their *EBR* application. The ECO notes the relatively short time span between the letter and *EBR* application, however, if the ministry could have acknowledged or responded to the applicant's letter in a manner that would not compromise the investigation, this could have alleviated some of the frustration experienced by the applicants. The public should not feel compelled to file an *EBR* application in order to get a ministry to acknowledge concerns sent by way of correspondence.

The ECO commends MOE for investigating the allegations made by the applicants. The ECO notes that not all contamination can be assessed visually and in many circumstances requires soil and water testing to make a conclusive determination. The allegations and evidence provided by the applicants point to potentially serious environmental harms if the contaminated soil has been disposed improperly. Although the investigation was not conducted under the *EBR* process, the ECO urges MOE to treat the investigation as if it was, and to provide the results to the applicants and the ECO in a timely fashion.

The ECO is also pleased that MOE reaffirmed that the developer is required to comply with the requirements set out in the Record of Site Condition Regulation, O. Reg. 153/04, made under the *EPA*. The regulation sets out requirements for conducting site assessments and remediation to obtain a Record of Site Condition (RSC). An RSC is required to redevelop a former brownfield site to a more sensitive use. The ECO has discussed Ontario's brownfield legislation (including O. Reg. 153/04) in past reports (2004-2005, 2005-2006, 2006-2007) and included a detailed discussion of recent brownfield legislative amendments in this year's Annual Report at Part 3.7. The ECO awaits the outcome of MOE's investigation of the site in question.

Review of Application I2007003:

6.1.6 Alleged *EPA* and *OWRA* Contraventions, re: Snow Dump (Investigation Denied by MOE)

Geographic Area: Midland-Penetanguishene

Background/Summary of Issues

In May 2007, the applicants used the *EBR* to allege that the Municipality of Penetanguishene and a sand and gravel company contravened the *Environmental Protection Act*, section 14 (Prohibition, contamination causing adverse effect) and the *Ontario Water Resources Act*, section 30 (Discharge of polluting material prohibited) by dumping snow at the site of the company's gravel pit. The applicants alleged that the snow dumped at the site was contaminated with road salt, motor vehicle oil and other foreign matter. It is alleged that these substances are contaminating local ground and surface water and this water flows in the direction of municipal water wells within the Town of Midland.

Also included in the application was a 2002 letter from an engineer with the Town of Midland directed to the Town of Penetanguishene. In the letter, he requested that the Town of Penetanguishene give thought to relocating the snow dump in order to protect the Town of Midland's water supply. The letter also stated that "We have noted the filling of the pre-existing wetlands adjacent to a water course." The applicants added that these concerns were expressed to the Town of Penetanguishene by residents, and by the Town of Midland itself.

Ministry Response

MOE denied this request for investigation and provided reasons. MOE reported that a consultant for the Town of Midland undertook a study in 2002 of some of the Town's municipal drinking water wells. The wells are approximately two kilometres away from the snow disposal area identified by the applicants. MOE wrote that this study concluded that these wells' water supply was considered "Ground Water Under the Direct Influence (GUDI) of surface water." However, since the nearest wells are about two kilometres from the snow dump site, this distance minimizes the likelihood of contamination of the Town of Midland's water supply. MOE reported that the water source for these wells has been deemed GUDI based on the results of "isotope analysis, the similarity of groundwater and surface water chemical signatures, the reversal of gradients during pumping and the 50 day travel time assessment" and that the "same report concluded that the wells provide effective in-situ filtration."

MOE went on to say that the results of chemical characterization of raw water samples from these wells showed no chemical contamination of the aquifer. In addition, ongoing monitoring of the Town's water supply continues to meet Ontario Drinking Water Quality Standards according to MOE. The ministry also described other water sampling and monitoring measures like the Drinking Water Surveillance program in which the Town of Midland participated. All of these programs have confirmed that thus far there were no issues with the Town of Midland's water quality.

On February 2, 2004, ministry staff received a complaint that the owner of the gravel pit was accepting snow that was collected from various commercial lots and roads, and the snow was being dumped on a section of the site close to a creek. On March 11, 2004, ministry staff met with the gravel pit owner and instructed him to move the snow disposal area at least 180 metres away from the water course as outlined in MOE's Guideline on Snow Disposal Sites. The owner did so voluntarily. MOE concluded by reporting that there have been no complaints about, or compliance activity required for, this site since 2004.

MOE's Legal Rationale:
MOE cited sections of three Acts in its legal analysis: the *Environmental Protection Act* (*EPA*), the *Ontario Water Resources Act* (*OWRA*) and the *Environmental Bill of Rights* (*EBR*). For example, MOE cited *OWRA*, section 30 which states that "every person that discharges or causes or permits the discharge of any material of any kind into or in any waters or on any shore or bank thereof or into any place that may impair the quality of the water of any waters is guilty of an offence." MOE did not interpret this section for the applicants, nor did the ministry state that the Town of Penetanguishene or the gravel pit owner did or did not contravene the *EPA* or the *OWRA*. It made these citations in complete isolation, so leaving the reader in the dark as to whether or not the alleged contraveners actually broke any environmental law.

ECO Comment

The ECO has received numerous letters and applications over the years concerning the contamination of the natural environment by road salt and other de-icing agents. The protection of ground and surface water remains high on the list of the public's concerns about the environment.

In this instance, the ECO believes that MOE had grounds for denying this application for investigation. The water quality results from various sampling and monitoring programs confirmed that there were no water quality issues in municipal wells in Midland that were nearest the snow dump. In the years ahead, this snow dump may be a matter of interest to the local source water protection committee, which was formed to carry out certain water resource protection roles under the *Clean Water Act*.

MOE's decision summary at times was very technical in nature (both scientifically and legally). The ECO recommends that ministries should attempt to explain technical terms to the applicants in a plain language fashion and also draw clearer conclusions from their legal citations. The ECO also suggests that MOE could provide the applicants with diagrams or maps, when discussing scientific methods like aquifer testing and pumping tests. In addition, ministries could provide links to, or copies of any of their plain language publications that describe complex issues that relate to an application.

Finally, the ministry deserves criticism for its handling of this file. MOE was very late in responding to the applicants. The ministry received this application on May 14, 2007. On that same day the ministry wrote to the applicants explaining that if the investigation is not undertaken they would be notified by July 13, 2007. If the investigation were to be undertaken, the ministry would convey the results by October of that year. The ministry did not respond to the applicants with a written decision until February of 2008. This was more than six months after the 60 day statutory period for deciding on whether to investigate had elapsed. The ECO notes that a number of other applicants experienced similar problems with MOE responses in this past reporting period. These delays are unacceptable and undermine the intent of the *EBR* to provide timely access to environmental rights.

Review of Application I2007004:

6.1.7 Alleged *EPA* and *OWRA* Contraventions, Former Landfill Site on Campgrounds (Investigation Denied by MOE)

Geographic Area: Town of Penetanguishene

Background/Summary of Issues

In May 2007, two applicants filed an *EBR* application alleging that contaminated leachate from a former landfill site was flowing into a creek, and then, after a short distance, draining into Georgian Bay. The Town of Penetanguishene had operated a dump site at the location (111 Robert Street West) until 1966. In 1972 the municipality changed the land use designation for the site and constructed a public campground on it later that year.

The applicants alleged that the Town of Penetanguishene is contravening section 14 of the *Environmental Protection Act*, (Prohibition, contamination causing adverse effect) and section 30 of the *Ontario Water Resources Act* (Discharge of polluting material prohibited) by allowing leachate from the former landfill site to discharge into Copeland Creek. The application also stated that the applicants previously had contacted officials at both Simcoe County and the Town of Penetanguishene. According to the applicants, these officials told them their respective municipalities had no intention of investigating the problem or taking any action. The applicants believe that "it is horrible" that children run around the contaminated material with bare feet and swim in the leachate discharges from the former dump.

The application did not include any supporting documents or evidence such as pictures, technical documents, consultant, government or municipal reports, newspaper articles or media reports on the site. Moreover, no evidence was provided on the extent of the contaminated effluent migrating from the site into the adjacent creek.

Additional Background:
Penetanguishene is a community with a population of approximately 9,000 located on the southerly tip of Georgian Bay in Simcoe County.

Copeland Creek is one of six sub-watersheds that make up the Severn Sound Watershed. The Severn Sound Watershed is located within three regional-scale physiographic regions: the Carden Plain, Simcoe uplands and the Georgian Bay fringe.

In the 1980s, the Severn Sound area was identified as an Area of Concern (AOC) by the International Joint Commission, in consultation with Environment Canada and the Ministry of the Environment. In the late 1980s, a remedial action plan (RAP) was developed for the AOC. In 1997, the Severn Sound Environmental Association (SSEA) was formed with the goals of overseeing the delisting of Severn Sound as an AOC and ensuring that the local remedial action plan work would continue in the future. Members of the Association include Environment Canada, MOE, the Towns of Midland and Penetanguishene, the City of Orillia, and a number of townships in Simcoe County. In 2003, Severn Sound was removed from the IJC's list of AOCs. Copeland Creek is one of the streams that benefitted from natural re-vegetation and stabilization of stream banks, thanks to the work of the Severn Sound RAP Tributary Rehabilitation Project and similar programs that predate the RAP Program such as the Community Fisheries/Wildlife Involvement Program (CFWIP) established by the Ministry of Natural Resources in the 1990s.

Ojibwa Landing Campground:
Between 1972 and 2007, the Ojibwa Landing Campground was a five-acre municipal park which offered a swimming and playground area, walking and bicycle trails, fishing and tent/trailer camping.

In July 2006, the Town retained the Severn Sound Environmental Association to undertake surface water sampling from Copeland Creek which flows along the boundary of the former Ojibwa Landing Campground and into Georgian Bay. It is unclear as to why the Town retained the SSEA to undertake the surface water sampling, and MOE staff were unable to explain why this sampling work was undertaken. The SSEA did not respond to ECO requests for additional information. However, it appears the sampling was related to work for the area on source water protection planning in anticipation of the application of the *Clean Water Act*.

In March 2007, the Town and the County of Simcoe announced that the Ojibwa Landing Campground would be closed effective the beginning of the 2007 camping season. In a joint press release, the Town and the County noted that "the campground has enjoyed many seasons with local and visiting campers" but that ownership of the site was being transferred to the County of Simcoe. Thus, the Town and the County had agreed "that while its disposition is being determined, the campground will be permanently closed in order to study and evaluate new, potential future uses."

In May 2007, Simcoe County retained the services of Jagger Hims Limited to undertake surface water sampling from Copeland Creek. Results from the sampling work by the SSEA and Jagger Hims Limited suggested that discharges to Copeland Creek are not causing any adverse impacts on the creek.

The Original Landfill Site and its Status:
The ECO was unable to determine when the original landfill site was developed, what size of population it was intended to service, or its expected period of service. The site, which was closed in 1966, was developed before the Ministry of the Environment (MOE) was established in 1971, and the original approvals, probably issued by Ontario Department of Public Health, did not require the Town to install a liner, or any other leachate collection and treatment system. In addition, it was designed before the MOE had developed policies restricting leachate that enters groundwater below a site.

The ECO was unable to locate many documents describing the status of the 111 Robert Street West landfill site. One of the few documents that is available is an MOE report titled MOE Waste Disposal Site Inventory dated May 1988. This report identified the closed landfill as a Class A site. According to the report, Class A sites are those that MOE considered to be hazardous to humans for a range of reasons, and the report indicated that "further investigation may be warranted to define precisely the hazards" and to determine whether any MOE mitigation of risks was required.

Based on the information currently available to the ECO, it is understandable that the MOE decided in 1988 to classify the site as potentially hazardous to humans. As noted below, it is apparent there were a number of private wells in close proximity to the landfill in 1988 although it is unclear how many of them were supplying potable water. In addition, it is apparent that two large municipal wells for the Town, the Robert St. West wells #2 and #3, were in operation at the time MOE staff prepared the 1988 inventory report. Moreover, the Ojibwa Campground had been operating for more than 13 years and MOE likely would have been aware that campground users used Copeland Creek for recreational purposes. The ECO is unable to ascertain whether any campground users may have consumed water from the creek during the period that the campground operated.

As noted in the ECO's 2005-2006 Annual Report, MOE last updated its inventory of small, aging landfills in 1991. Thus, no additional information appears to be available on this landfill site. For example, it is not known precisely what types of waste might have been disposed at the landfill site and whether any industrial waste was disposed at the site.

As of May 2008, the closed site remains under the ownership of the town. Most similar sites are owned by upper tier municipalities because, in 1994, the Ontario government enacted reforms to the *Municipal Act,* R.S.O. 1990 (Bill 7) which changed legal responsibilities for municipal waste management. As a general rule, waste management assets were transferred from lower-tier municipal governments such as towns and cities to upper-tier governments, such as regions and counties. Since the 111 Robert Street West landfill site had been closed for more than 25 years, it was not considered an asset and was not transferred to the county after Bill 7 was enacted.

In 2006, Simcoe County began updating its inventory of historic landfill sites and the site below the Ojibwa Landing Campground was identified as one that could be transferred by the town to the county. In May 2007, Simcoe County also decided that it would not assume responsibility for the campground site. According to MOE, the site remains the property of the Town. As of March 2008, the Town had not made an official announcement on the disposition of the site.

Under laws and regulations that have been developed by MOE in the past thirty years, there now are restrictions placed on how former landfill sites can be developed. Section 46 under the *EPA* states that "no use shall be made of land or land covered by water which has been used for the disposal of waste within a period of twenty-five years from the year in which such land ceased to be so used unless the approval of the Minister for the proposed use has been given." The campground development on the Robert St. Landfill was undertaken before this section of the *EPA* was enacted in the 1980s. Since MOE did not include legislative provisions requiring municipalities to maintain an inventory of existing land uses on former landfills it is unclear as to whether most residents were aware that the campground had been sited on top of a closed landfill.

Under MOE regulations and guidelines developed in the 1980s and 1990s, the final closure of landfill sites must be completed in a manner that is aesthetically pleasing and ensures long term protection of the environment. Again, these requirements were established more than 30 years after the Robert Street West landfill was closed.

Robert Street West Wells and Well Field:
In 1991, the Ontario Ministry of the Environment ordered the Robert St. West well field in Penetanguishene shut down when some of the wells became contaminated with trichloroethylene (TCE) and dichloroethylene (DCE). Prior to 1991, the two affected wells, the #2 and #3 Robert St. West wells, supplied a significant proportion of the water supply for Penetang.

The well field is adjacent to the former dump site under the public campground, separated by Champlain Road. Both properties are owned by the Town but they are separate parcels. It is not known whether there has been any off-site migration of contaminants from the two parcels onto adjacent private property. Indeed, it seems plausible that off-site migration from the closed landfill has been limited and has remained undetected because the two parcels are owned by the Town.

For more than 10 years, the Town has been seeking infrastructure funding to help pay the cost of building a new water treatment plant to bring the Robert Street West well field back on stream. On February 22, 2008, the federal government announced it will consider the construction of a water treatment facility as a priority for up to $1.367 million in federal funding under the municipal rural infrastructure grant program. Ottawa's contribution would be about one-third of the plant's original projected $4.18 million price tag. The project involves the installation of a Packed Tower Aeration (PTA) system to treat the contaminated water at the Robert Street Well Field and reconnect the field to the Town's water supply system. According to Town officials, this upgrade will improve the water quality and supply for Penetanguishene. The Town also is considering using an ultraviolet-oxidation technology, according to information provided to the ECO by Town officials in late April 2008.

According to information on the website for the local Member of Parliament as of March 19, 2008, federal financial support for the project "is conditional on the initiative meeting all applicable eligibility requirements and other program criteria to be approved by Treasury Board, a federal review of the project, the successful completion of an environmental assessment, and assurance by the municipality that the remaining project costs have been fully financed." According to information provided to the ECO by Town officials in late April 2008, the Town cannot currently afford to pay for the balance of the required funding (an estimated $3 million) and are hoping that another partner like the Ontario government can supply the needed additional funds.

The ECO was unable to locate any documents or reports linking problems at the Robert St. West well field to the past operation of the landfill site at 111 Robert St. West. ECO staff made requests for documents to the district office of MOE in Owen Sound and to the MOE's Central Offices in Toronto. Some documents, including a detailed Environmental Assessment study prepared in 1996, were obtained from the town but none provided any conclusive data showing any linkages between the Robert St. West well field, or contamination thereof with TCE and DCE, to the past operation of the landfill site at 111 Robert St. West.

The ECO also requested from MOE, and was provided with, the reports from the 2006 and 2007 sampling work by the SSEA and Jagger Hims Limited. These reports suggested that discharges to Copeland Creek are not causing any adverse impacts. The ECO reviewed the two reports and notes that neither the SSEA nor Jagger Hims actually sampled for TCE and DCE contamination in Copeland Creek.

Ministry Response

MOE denied this request for investigation and provided reasons.

In June 2007, ministry staff attended the site with staff from the town. According to the MOE, ministry staff did not observe any off-site adverse impacts to Copeland Creek or Georgian Bay. Ministry staff advised the Town's staff to "ensure that the site was secure and to ensure that the cover soils and vegetation on the historic site are maintained."

MOE also cited the results from the sampling work by the SSEA and Jagger Hims Limited, and explained that the results have been reviewed by the ministry's Technical Support Section. The ministry stated that its review of these results "show no adverse impacts to Copeland Creek in the vicinity of the Ojibwa Landing Campground property."

In its response, MOE also cited sections of three Acts: the *Environmental Protection Act* (*EPA*), the *Ontario Water Resources Act* (*OWRA*) and the *Environmental Bill of Rights* (*EBR*). For example, MOE cited *OWRA*, section 30 which states that "every person that discharges or causes or permits the discharge of any material of any kind into or in any waters or on any shore or bank thereof or into any place that may impair the quality of the water of any waters is guilty of an offence." The ministry also went on to cite the wording of section 14 of the *EPA* which states that any person who causes an adverse effect by discharging a contaminant may be contravening the *EPA*. In other words, a provincial officer order can be issued for a section 14 contravention if the contravention causes or is likely to cause an adverse effect.

MOE also noted that under section 77 of the *EBR*, the MOE has discretion to decide that the minister does not have to carry out an investigation.

ECO Comment

In this instance, the ECO believes that MOE had grounds for denying this application for investigation. On their face, the water quality results from the two sampling reports appeared to confirm that there are no water quality issues related to the closed dump. However, it is noteworthy that neither of the sampling studies tested Copeland Creek for TCE, DCE or other organics. These parameters are relevant because they were detected in the adjacent Robert Street well field and it is possible that leachate from the closed landfill site has migrated to the deep aquifers that supplied the Robert Street wells.

Despite this, there are some troubling questions that remain unresolved. It seems surprising that the Town and the MOE allowed the campground to operate above the Robert St. West landfill for more than 32 years between 1974 and 2006. According to the *EPA* and Regulation 347, R.R.O. 1990 (Waste Management) made under the *EPA*, the ministry is supposed to require operators and/or owners of operating landfills and non-operating landfills and dumps to comply with *EPA* and Regulation 347 requirements for the control of adverse effects caused by these facilities.

Protection of ground and surface water is an essential goal of public policy and an important value for many Ontario residents. In the past fourteen years, the ECO has received numerous letters and complaints related to contamination of the natural environment from leachate discharged by landfills and contaminated sites. The ECO has also received *EBR* applications regarding other closed landfill sites (e.g., the Cramahe Landfill site) and many operating sites. In most cases, applicants have raised concerns that landfill leachate was migrating or would migrate offsite and contaminate surface water and groundwater. In the years ahead, this closed dump and other dumps in the Penetang area may be a matter of interest to the local source water protection committee, which was formed to carry out certain water resource protection roles under the *Clean Water Act*.

In its decision notice on the application, MOE did not explain section 30 of the *OWRA* or section 14 of the *EPA* to the applicants, or clarify the basis for its determination that no alleged contraventions are taking place. In the future, MOE should make an effort to better explain technical terms to the applicants in plain language fashion and also to explain their conclusions about alleged contraventions in clearer terms.

MOE also handled this file in a seriously deficient manner, contrary to the spirit and intent of the *EBR*, by delaying its response by more than six months. Initially, the ministry wrote to the applicants on May 14, 2007 explaining that if the investigation is not undertaken they would be notified by July 13, 2007. If the investigation were to be undertaken, the ministry would convey the results by October of that year. The ministry did not respond to the applicants with a written decision until February of 2008. This was more than six months after the 60-day statutory period for deciding on whether to investigate had elapsed. The ECO notes that a number of other applicants experienced similar problems with MOE responses in this past reporting period. As noted elsewhere in this Supplement, these delays are unacceptable and undermine the intent of the *EBR* to provide timely access to environmental rights.

Review of Application I2007005:

6.1.8 Alleged *EPA*, Section 186(3) and *OWRA* Section 30(1) Contravention re: Guelph Wet/Dry Recycling Centre

(Investigation Denied by MOE)

Geographic Area: Guelph

Background/Summary of Issues

In June 2007, an application for investigation was filed with the Ministry of the Environment (MOE) alleging contraventions of the *Environmental Protection Act* (*EPA*) and *Ontario Water Resources Act* (*OWRA*). The applicants contended that the City of Guelph failed to comply with the Certificate of Approval (C of A) A170128 for waste disposal issued for its Wet/Dry Recycling Centre (the "centre"). The applicants claimed that the City contravened section 186(3) of the *EPA* when it released discharges in violation of its C of A (waste disposal), thereby contaminating the soil and groundwater contrary to section 30 of the *OWRA*.

The City of Guelph owns and operates the Wet/Dry Recycling Centre (also known as the Waste Resource Innovation Centre) that includes a material recovery facility, an organic waste composting facility, and a household hazardous waste transfer station. When it opened in 1995, the centre was considered to be a model in waste management because it had a diversion rate of 58 per cent and a public participation rate of 98 per cent. The citizens of Guelph separate their wet and dry waste at the curb and the two collections are transferred to the centre where the dry stream is sorted to recover recyclables. The wet stream was debagged, screened and composted. The resulting compost was then sold to soil blenders and landscapers. The centre processes the city's recyclable material, as well as those received from other parts of the province.

The composter was closed in June 2006 because of odour complaints and repairs needed to the facility. In July 2006, MOE laid eight charges against the city and two charges against the city's former solid waste manager for odour complaints on 27 days between January and October 2005. In November 2007, the city pleaded guilty to discharging odours into the natural environment that caused an adverse effect contrary to section 14(1) of the *EPA* and was fined $40,000 (plus a victim fine surcharge). The other charges were dropped. Organic waste is presently being trucked to New York for incineration, while the city explores new compost technology to rebuild the composting plant.

The centre was issued Cs of A for waste disposal site (processing) and air emissions under the *EPA*, and a C of A for sewage works under the *OWRA*. The applicants claim that the C of A for the waste disposal site was violated in 2001, when the centre redirected sanitary lines to discharge waste into storm management ponds. In addition, the applicants stated that the alterations to the curb containment system in the fall of 2001 were not completed until the spring of 2002, and during this time contaminated runoff entered the storm water management pond. The applicants believed that these alterations occurred without the requisite MOE approval and therefore breached the terms of the C of A.

The applicants described the potential threat posed by contaminated runoff from the centre to the aquifer and the potential contamination of well-sourced drinking water and soil. In addition, the centre is situated near the Eramosa River and soil and groundwater contamination could adversely impact fish and wildlife, according to the applicants.

The applicants submitted two reports – an engineering report and a C of A annual report – and photos documenting waste being stored outdoors and a diesel spill on the property to support their allegations of contamination of the storm water management system.

Ministry Response

In July 2007, MOE denied the application for investigation. In its decision, MOE stated it relied on section 77(3) of the *EBR*, which states that the minister is not required to duplicate an existing investigation. MOE stated that its preliminary investigation of the application revealed that ministry staff were "already aware of the storm water management system modifications and groundwater monitoring results at the site and has been carrying out an equivalent investigation." As a result, MOE determined that further investigation was not warranted. The findings from MOE's "equivalent investigation" were released on April 30, 2008 and forwarded to the applicants and the ECO. The results are summarized below.

Although the applicants did not specify the sections of the Acts or conditions of the Cs of A they believed were breached, the ministry examined several provisions that may have been contravened under the *EPA* and the *OWRA*, as well as the evidence put forth by the applicants to support their allegations.

Section 186(3) of the EPA:
Under section 186(3) of the *EPA*, every person who fails to comply with a term or condition of a C of A under the Act is guilty of an offence. MOE explained that the provision only applied to Cs of A issued under the *EPA* - in this case it is the C of A for a waste disposal site. MOE asserted that the application did not clearly indicate what condition of the C of A was violated, although the applicants alleged the waste disposal C of A was violated by the improper storage of waste outdoors. Ministry staff determined that "the storage of the materials is not a contravention of the C of A."

Section 53(1) of the OWRA:
The applicants also questioned the legality of the modification to the centre's storm water management system, which was covered by a C of A (sewage works) under the *OWRA*. According to section 53(1) of the *OWRA*, no person shall alter existing sewage works without prior ministry approval.

The ministry stated that in 2001 and 2002, the city modified the storm water sewage system at the centre, allegedly without ministry approval. Ministry staff conducted a site inspection of the centre in December 2005 that included an assessment of all Cs of A. The inspection confirmed that the storm water management system had been modified, allegedly without an amendment to the sewage works C of A.

The storm water management system had been redesigned to divert storm water on the compost pad to clay-lined detention ponds that subsequently discharged to the sanitary sewer system. MOE also indicated that the centre's 2006 annual report filed under the waste disposal C of A showed the system was redesigned as well. Consequently, this matter was referred to the Ministry's Investigations and Enforcement Branch (IEB) in February 2006, and was under investigation. As such, MOE stated it could not comment further on this matter.

Additionally, the ministry decision did state that the city retained an engineering firm to assess the site's storm water management system and that the city intended to submit an application for approval of the system's current configuration and proposed upgrades in July 2007.

Section 30 of the OWRA and Section 14(1) of the EPA:
MOE concluded that section 30 of the *OWRA* and section 14(1) of the *EPA* were not contravened by the centre. Section 30(1) of the *OWRA* and section 14(1) of the *EPA* prohibit the discharge of any material or contaminant into waters that may impair its quality or have an adverse effect. The storm water detention ponds normally discharge into the sanitary sewer but are also configured to allow for the discharge of the storm water into municipal ditches. MOE stated that it had not received any information or evidence refuting the city's assertion that it released the contents of detention ponds into the sanitary sewers.

MOE also reviewed the 2004, 2005, and 2006 annual reports for the centre and determined that operations at the site had not adversely impacted the groundwater. Furthermore, in August 2006, MOE staff reviewed monitoring data for the detention ponds and concluded that no significant impact could be expected if water was released into the ditches. The 2006 annual report showed some compounds in the groundwater may be elevated in association with the site but they were not present at levels that would pose an adverse effect on potable groundwater.

The ministry stated it would require the city to carry out improved monitoring to understand the source of the elevated compounds in groundwater, and monitor any trends in contaminant concentrations during the summer of 2007.

Section 92(1) of the EPA:
MOE found that section 92(1) of the *EPA* was not breached. This provision requires every person who spills a pollutant to immediately notify the ministry of the spill and the actions taken. The ministry said the applicants' photographs of a spill on the property were undated, and the city had notified the ministry of a "minor spill of diesel fuel" in March 2007. The spill was reportedly cleaned up and no adverse effects were anticipated. MOE staff attended the site and observed no visual signs of contamination.

Lastly, the ministry stated that staff would continue to take the appropriate steps to ensure that the City of Guelph complies with the *EPA* and *OWRA*, although they did not elaborate further on what these steps would be.

MOE's Equivalent Investigation:
MOE's July 2007 decision noted that it was investigating allegations that the City of Guelph modified the sewage works at the Wet/Dry facility without prior ministry approval and contrary to section 53 of the *OWRA*. MOE shared the outcome of this investigation on April 30, 2008. The investigation revealed that modifications to the storm water collection system took place in 2002. The modifications included the installation of a connection between the sanitary and storm water management collection systems, and the construction of a berm in a storm water pond to control contaminated water during a severe storm water event.

Ministry investigators decided not to recommend charges in this case based on their findings. MOE stated that the City of Guelph has now submitted an application for approval for the modifications, which is currently under review.

Ministry staff also reviewed the monitoring data for the site as part of the routine assessment of the facility's annual reports, and determined "no significant impact to the environment was anticipated."

Enhanced groundwater monitoring has been initiated by the City of Guelph, and the results are in the annual report submitted to MOE in March 2008. Nitrate and nitrite sampling was re-instated along with additional monitoring wells to better define groundwater flows. MOE promised to complete a technical review of the annual report and provide appropriate follow-up.

ECO Comment

The ECO believes the MOE's rationale for denying this application was reasonable. MOE did address each allegation set out in the application and assessed the evidence that accompanied the application. MOE was aware of the modifications made to the centre and was conducting an investigation at the time the application was submitted. The ECO notes that this application is one of several included in the 2007-2008 Supplement that MOE has denied because the matter was already being investigated. The ECO commends MOE for forwarding the outcome of the investigation to the ECO and the applicants. The ECO urges MOE to continue to monitor the centre's compliance in light of the fact that there have been several problems noted at the site to ensure that odour problems, spills and other environmental issues are prevented or mitigated.

The ECO notes that the 2007-2008 Supplement includes several other applications regarding water concerns in the Guelph area. For example, the Nestle permit to take water application involved a water bottling operation extracting water for its operations outside of Guelph (see section 5.2.6 of this Supplement) and the Paris Galt Moraine application related to a request for legislation to protect the moraine because of its role as a groundwater recharge area in the Grand River watershed (see section 5.3.3 of this Supplement). As described in the ECO 2006-2007 Annual Report (page 26), the City of Guelph is wholly dependent on groundwater for its municipal drinking water supply, and the ability to meet the needs of a rapidly growing population has become a major concern.

Review of Application I2007006:

6.1.9 Alleged *OWRA* Contravention re: Herbicide Spraying by Forestry (Investigation Denied by MOE)

Geographic Area: Northern Ontario

Background/Summary of Issues

On August 9, 2007, two residents of Ontario submitted an application for investigation to the ECO alleging that two forestry companies had contravened the federal *Fisheries Act* and the *Ontario Water Resources Act* (*OWRA*). The applicants asserted that the two forestry companies made unauthorized discharges of herbicides and herbicide formulants into northern Ontario waterways frequented by fish. The alleged contraventions by one company occurred in the Pineland Forest Management Unit between July and September, 2005. The alleged contraventions by the other company occurred in the Romeo Malette Forest Management Unit between July and September, 2006.

The ECO referred this application to the Ministry of the Environment (MOE) for consideration. The ECO advised the applicants that MOE takes the position that it is not required to investigate contraventions of the *Fisheries Act*, and that MOE would consider the application only in the context of the alleged violations of the *OWRA*. For further discussion about MOE's position regarding the *Fisheries Act*, see the ECO's review of the Fish Habitat Compliance Protocol in Part 3.6 of this Annual Report.

Section 30(1) of the *OWRA* prohibits the discharge into water (whether directly or indirectly) of materials that may impair the quality of the water. Amendments to the *OWRA* made under the *Environmental*

Enforcement Statute Law Amendment Act (*EESLA*) in 2005 created a presumption that water is impaired by the discharge of material if the material discharged (or a derivative of the material) enters or may enter the water and certain circumstances are met (e.g., if the material may cause harm to a living organism in contact with the water; if authoritative scientific literature indicates that the material discharged can cause harm to aquatic organisms; if the material discharged may degrade the appearance, taste or odour of water; or if the material or its derivatives are toxic). The intent of this "deemed impairment" provision in the *OWRA* was to make it easier for the Crown to prove alleged contraventions of section 30(1). (For a more detailed review of the *EESLA* and the deemed impairment provision of the *OWRA*, see the Supplement to the ECO's 2005-2006 Annual Report, page 102).

The applicants alleged that aerial applications of herbicides by the forestry companies were contaminating waterways in northern Ontario, jeopardizing environmental health and economic welfare. The applicants stated that the herbicide applications are contaminating traditional food sources and impacting the traditional lifestyle of Inuit and Northern Cree. The applicants stated that the herbicides eventually flow from local waterways into James Bay and Hudson Bay, constituting a continuous offence.

The applicants argued that the *OWRA* is being routinely contravened by forest management companies spraying herbicides in northern Ontario. The application outlined three ways that herbicides reach waterways: 1) via spray drift from aerial applications; 2) by direct application; and 3) via run-off and groundwater contamination. The applicants expressed concern that the Ministry of Natural Resources' (MNR) guidance document on buffer zones for aerial pesticide applications does not protect small water bodies from being sprayed, including headwaters that often serve as spawning and rearing habitat for fish. The applicants reported their observations about the effects on the environment that they attributed to herbicide spraying in northern Ontario over the years, including destruction of flora and disappearance of fauna in sprayed areas.

The application included background information, with reference to scientific papers and other sources, about 2,4-Dichlorophenoxyacetic acid (2,4-D) and glyphosate (herbicides commonly used in forest management) and the effects of pesticide exposure on the environment and human health. In particular, the applicants noted that 2,4-D has been banned in several countries because of its impact on aquatic ecosystems, fish and human health, and that glyphosate has been shown to have carcinogenic and mutagenic effects on numerous organisms. The applicants expressed concern about potential synergistic effects of herbicides and other chemicals in the environment.

The applicants requested that the Ontario government investigate the alleged 2005 and 2006 violations. They also requested that the government conduct sampling of waterways before and after herbicide applications planned for summer 2007 in several of northern Ontario's Forest Management Units (FMUs) to determine whether pesticides are entering and affecting watercourses and related fisheries. The applicants requested that the government review, renew and implement monitoring and mitigation measures to ensure compliance with the *Fisheries Act* and the *OWRA*.

The ECO suggested that the applicants make a petition to the Federal Commissioner for Environment and Sustainable Development (CESD) relating to the alleged *Fisheries Act* violations. On August 13, 2007, the applicants submitted Petition No. 214, "Impact of herbicides on fish and fish habitats in northern Ontario," to the CESD. The petition and replies from the federal departments responsible for responding to the petition (Environment Canada, Fisheries and Oceans Canada, Health Canada, Indian and Northern Affairs Canada) can be viewed on the CESD website (www.oag-bvg.gc.ca).

Ministry Response

MOE delivered its decision on February 5, 2008. The ministry decided not to conduct an investigation of herbicide spraying by the forestry companies "due to the absence of evidence that an offence under the *Ontario Water Resources Act* has occurred." The ministry stated that the applicants' arguments "do not constitute specific evidence as to how the quality of water has been impaired in these instances." The ministry concluded that an investigation was not warranted based on *EBR* section 77(2)(c), which states that a minister is not required to conduct an investigation if the alleged contravention is not likely to cause harm to the environment.

MOE provided background information about Ontario's forest management framework for herbicide spraying. Briefly, herbicide spraying must be conducted pursuant to the provisions of a Forest Management Plan for a forestry company's Sustainable Forest Licence. Herbicide spray projects are reviewed and approved by MNR under the *Crown Forest Sustainability Act*. A pesticide permit under the *Pesticides Act* is also required for all aerial pesticide applications in Ontario Crown Forests. Permit applications, which require detailed information about the proposed aerial spraying of herbicides, are reviewed by MOE. The ministry noted that there is an opportunity for the public to comment on herbicide spray projects during the Forest Management Plan and Annual Work Schedule approval process.

The ministry also explained that Health Canada's Pest Management Regulatory Agency ("PMRA") reviews the human health and environmental impacts associated with the use of pesticides in forest management, including Vision Forestry Herbicide®. PMRA concluded that this herbicide is "not deemed to pose an unacceptable risk to human health or the environment." Further, the ministry noted that the Ontario Pesticide Advisory Committee has deemed the herbicide appropriate for use in Ontario if the appropriate restrictions are followed.

MOE stated that during the times of the alleged violations of the *OWRA*, both forestry companies were operating under approved Annual Work Schedules and pesticide permits. The ministry provided detailed information about the companies' aerial herbicide permits and operational history. The ministry also provided a summary table of information extracted from the companies' Herbicide Summary Spray Reports for the specific treatment blocks identified by the applicants as the locations of the alleged contraventions. The ministry confirmed that records provided by the companies indicated that herbicides were applied on approved dates and within the boundaries of the approved treatment blocks. In fact, both companies reported spraying fewer treatment blocks and less area within blocks than they were permitted to spray under their permits.

MOE further stated that it has "no evidence of impact to the environment from herbicide spraying for forest management on the Pineland or Romeo Malette Sustainable Forest Licences." The ministry reported that there was no record of any incidents or compliance issues with either company, and that MOE had not issued any legal instruments to either company regarding herbicide spraying pursuant to the Sustainable Forest Licences in question.

The ministry concluded that the applicants had not provided any evidence that a discharge of a substance that may impair the quality of water had occurred, and that the applicants' arguments about the general environmental safety of pesticides were not sufficient to establish that *OWRA* offences were committed as alleged. The ministry stated that it did not believe it would be scientifically supportable to collect physical evidence in 2007 of alleged contraventions that occurred in 2005 and 2006, given the time that had passed, decomposition rates and volumes of herbicides applied in 2005 and 2006.

The ministry did not address the applicants' request for sampling to be conducted before and after spraying in Ontario FMUs in summer 2007, or the applicants' request for monitoring and mitigation measures to be implemented to ensure compliance with the *OWRA* and the *Fisheries Act*. The ministry also did not specifically address the applicants' concerns about the lack of protection for small water bodies in the Buffer Zone Guidelines for Aerial Application of Pesticides in Crown Forests of Ontario.

The ministry confirmed that it will continue to enforce the *OWRA* and other legislation as appropriate. The ministry also stated that it would continue industry outreach and information programs to encourage pesticide use reduction and best management practices, work with Health Canada regarding legislative change and product recommendations, and participate in pest management initiatives with other stakeholders including MNR, industry, First Nations and other members of the public.

Other Information

Following a four-year hearing by the Ontario Environmental Assessment Board (EAB), the 1994 Timber Class Environmental Assessment (EA) approval decision established the conditions under which MNR would be permitted to carry out forest management planning on Crown lands in Ontario. The EAB's decision included consideration of the potential effects of forestry herbicide spraying on human health and the environment. The EAB concluded that there was "no reliable evidence before us establishing that the use of chemical pesticides in timber management poses any significant or unacceptable risk to public health," that "pesticides authorized for use in forestry in Ontario do not pose risk of unacceptable environmental disturbance," and that "the public is entitled to rely on pesticides registration as evidence that chemical herbicides and insecticides are safe if used properly."

The 1994 Timber Class EA was extended and amended in 2003 by Declaration Order MNR-71, which was further amended in 2007 (MNR-71/2).

ECO Comment

The ECO believes that MOE's decision to turn down this application was reasonable. The ECO is disappointed, however, that MOE delivered its decision almost four months after the legislated deadline, a problem that has become systemic in that ministry.

The ministry was reasonable in concluding that the applicants' arguments about the general environmental safety of herbicide use were not sufficient to warrant an investigation of the alleged contraventions by the two forestry companies in question. The applicants did not provide evidence that would distinguish the two forestry companies from any other forestry companies that undertake authorized herbicide spraying in Ontario's FMUs. The applicants appeared to argue that all herbicide spraying for forest management may result in impairment to water and therefore constitutes a contravention of section 30 of the *OWRA*. The ECO notes that an application for review of Ontario's laws, regulations and/or policies pertaining to herbicide spraying (including, for example, MNR's June 1991 policy on Aerial Spraying for Forest Management) may therefore have been more fruitful. Given the overlapping jurisdiction over pesticide management and use, the applicants' concerns may be best addressed through a joint federal-provincial review.

In its decision, the ministry appears to take the position that, in the absence of any specific evidence, there was no reason to believe that the authorized spraying of herbicides that are approved for use by the appropriate agencies may impair water. The ECO notes that this rationale strongly resembles the EAB's conclusions about herbicides in the 1994 Timber Class EA decision (discussed above in "Other Information"), despite concerns expressed by the federal Commissioner of Environment and Sustainable Development in 2003 (and again, although to a lesser extent, in 2008) about shortcomings in PMRA's evaluation and re-evaluation of pesticides for use in Canada. The ECO also notes that the fact alone that herbicide spraying is authorized under Forest Management Plans and/or pesticide permits does not preclude potential impairment of water by the spraying. There may be circumstances in which an investigation would be warranted despite the fact that a forestry company complied with a Forest Management Plan and pesticide permit.

Because the threshold for proving impairment of water is low owing to the new "deemed impairment" provision of the *OWRA*, the ECO is cautious in its agreement that this application lacked sufficient evidence about impairment of water during the identified spray events. The ECO notes that the evidentiary burden on applicants should be low. Applicants should not be expected to provide evidence of the same calibre expected of the government (e.g., costly water sampling and analysis) to prompt an investigation.

By informing the applicants about the regulatory process, herbicide approval, and company compliance records, the ministry's decision may have alleviated some of the applicants' concerns about herbicide spraying by forestry companies. It would, however, have been helpful if the ministry had described any steps taken by the ministry (e.g., monitoring for acute or chronic toxicity to aquatic organisms) to satisfy itself that authorizing spraying at the specified locations, times and levels would not adversely affect local waterways, flora or fauna.

While the ministry reasonably concluded that any water testing undertaken after the application was filed in August 2007 would not yield evidence to support laying charges for the herbicide spraying in 2005 and 2006, the ministry did not respond to the applicants' request for water testing before and after future aerial herbicide spraying, or for monitoring and mitigation measures to ensure that herbicide spraying activities comply with the *OWRA*. The ECO notes that in the past, MOE pesticides officers would often be present on-site during aerial spraying to monitor compliance with pesticide permits. By discontinuing this practice, presumably due to capacity issues, MOE effectively relies on permit holders themselves for compliance information. As the ECO has previously stated, self-reporting must be supported by a reasonable inspection rate to ensure that self-reported data is accurate.

The public is becoming increasingly aware of and alarmed by the potential effects of pesticides on environment and health. While the applicants' evidence did not warrant a specific investigation of the forestry companies in question, the applicants' observations about declining flora and fauna in sprayed areas do warrant further enquiry by MNR and MOE. There is an ongoing obligation on these two approving ministries to satisfy the public that approved spraying activities do not pose an unacceptable risk to human health or the environment.

MOE did post a proposal for a policy on the Environmental Registry on January 18, 2008 (Registry number 010-2248) proposing to ban the cosmetic use of pesticides in Ontario. However, the notice specifically states that the policy would exempt the use of pesticides for managed forests "as they are already governed by stringent rules on the storage and application of pesticides." On April 22, 2008, Bill 64, the *Cosmetic Pesticides Ban Act*, which proposed to amend the *Pesticides Act*, was introduced to the Ontario Legislature for first reading. MOE posted a proposal notice for the Act on the Environmental Registry (number 010-3348) the same day. On June 18, 2008, the *Cosmetic Pesticides Ban Act, 2008* was passed. The ECO will report on this decision in a future Annual Report.

Review of Application I2007008:

6.1.10 Alleged Contravention of the *Environmental Protection Act* (Investigation Undertaken by MOE)

Background/Summary of Issues

On December 17, 2007, an application for investigation was filed that alleged that stamping presses from an adjacent facility are causing heavy vibrations and are having a negative effect on the applicants' precision machining operation. The applicants also alleged that the stamping facility has been operating without a Certificate of Approval (C of A) from MOE. An application for a C of A was posted on the Registry on November 19, 2007 and the applicants requested that an investigation occur before the C of A was issued.

The ECO forwarded the application to MOE.

Ministry Response

On March 3, 2008, the ECO was informed that MOE agreed to undertake an investigation. On May 16, 2008, MOE sent the results of the investigation to the applicants. MOE concluded that, "vibration levels did not exceed any ministry vibration limits, and did not support that vibration levels caused an adverse effect." MOE has however, referred the matter of alleged adverse impacts to the applicant's equipment and employees to the MOE Investigations and Enforcement Branch. MOE stated that the C of A is still under review. No information was provided on how long it would take the Investigations and Enforcement Branch to review the information.

ECO Comment

The ECO will review the handling of this application in the 2008-2009 Annual Report.

6.2 Ministry of Natural Resources

Review of Applications I2007001 & I2007002:

6.2.1 Alleged Contraventions through Road Construction by Township of Muskoka Lakes (Review Declined by MNR, MOE)

Geographic Area: Township of Muskoka Lakes

Background/Summary of Issues

In April 2007, the applicants submitted an application alleging that certain road work carried out by the Township of Muskoka Lakes contravened the *Environmental Protection Act* (*EPA*), *Ontario Water Resources Act* (*OWRA*), *Environmental Assessment Act* (*EAA*), *Lakes and Rivers Improvement Act* (*LRIA*) and the *Fisheries Act* (*FA*). The application was prepared by a Toronto law firm retained by the applicants when their independent actions did not achieve satisfactory results.

The alleged contravention occurred in April 2006, on land adjacent to that owned by the applicants, abutting Juddhaven Road and along the Lake Rosseau shoreline, in Concession 13 of the Township of Muskoka Lakes. Trees were removed and the existing road surface and ditches were dug up to permit road widening. The applicants allege that "ditches and drainage devices were installed such that storm and surface water, silt and sediment drain directly onto private property into watercourses and into the Lake," and that the transported sediment formed a plume in the lake. According to the applicants, materials laid on the existing road surface increased runoff onto private property. The applicants further allege that a non-water soluble emulsion applied to the roadway tended to run off onto private property and into the lake. The applicants also listed noise and dust as other contaminants discharged by the work.

Additional details sent by the law firm as supplementary information describe the work as the diversion of a creek running under Juddhaven Road from the north to south side of the road through a newly laid culvert. Also among this information is the applicants' claim that the new culvert blocks fish spawning because it was laid at "a much higher level" than the natural creek. The applicants further allege that insufficient grading of the road led to runoff onto adjacent properties and an increase in sand deposition where the creek meets Lake Rosseau.

The application included correspondence between the law firm and various government agencies. A letter from the Parry Sound District Office of the Department of Fisheries and Oceans (DFO) to the Township of Muskoka Lakes dated August 2006 documents DFO's involvement in the construction project. DFO states that it "attended the site" on numerous occasions since May 2006 to follow up on public concerns and to respond to the township's request to discuss sediment control issues. In its letter, DFO declared that the tree removal and ditching did not violate section 35(1) of the *FA* and that the increased sediment in the lake at the site in question was a "natural result of the extreme rainfall events that took place in late July, and not a direct result of lack of effort on behalf of the Municipality of Muskoka

Lakes." They further stated that the municipality has "shown due diligence with respect to improving, maintaining, and monitoring sediment control devices on site."

In a letter to the lawyer acting for the Township of Muskoka Lakes, the law firm expressed concern that the sediment and flood protection installed in the spring was removed in November of the same year, when natural vegetation was insufficient to protect against sediment runoff. This action, they stated, would likely contaminate the stream, lake and applicants' properties, particularly during spring runoff. The law firm requested prompt mitigation proposals. According to the law firm, the township lawyer responded that the township had "met its obligations as imposed by the appropriate government agencies" and no reference was made to the silt screen removal. The law firm included photos in the *Environmental Bill of Rights* (*EBR*) application, taken between May and August of 2006 that showed a lack of stabilizing vegetation in the location where silt screens had been removed, as well as: sediment screens that were not trenched and one screen that was lying flat; sedimentation and flooding over sediment screens, and runoff flowing from the culvert onto adjacent private property.

The application also included a copy of the DFO Fact Sheet, "Fish Habitat and the Effects of Silt and Sediment," as it appeared on the DFO website in 2006. The fact sheet gives a detailed account of the effects silt and sediment can have on fish habitat. It states that work resulting in the "harmful alteration, disruption or destruction of fish habitat (HADD)" requires authorization from the Minister of Fisheries and Oceans. It further states that approval may be required from more than DFO and that where there is no designated conservation authority, approval must be sought from the Ministry of Natural Resources (MNR). The fact sheet indicates that it is important to avoid the introduction of silt and sediment into rivers and lakes and, that there are effective methods of prevention. It explains that where shoreline vegetation is disturbed, proper placement of silt curtains will prevent silt and sediment from entering the water. The fact sheet recommends revegetating a disturbed site as soon as possible and that any exposed soil be covered to prevent mobilization resulting from wind and rain. It also recommends the daily inspection and maintenance of sediment or silt screens. Finally, it recommends that all necessary approvals and permits be obtained prior to initiating work around water.

The application included a report by an environmental consultant retained by the applicants to confirm the source of the turbidity in Lake Rosseau near their properties. The report indicates that the most significant contributor to the suspended solids flowing into the lake during the July 2006 rain event was one of the new ditches dug by the township earlier that year. The consultants stated that the newly dug ditches were still bare of vegetation in July and that by August "a great deal of sediment had collected on top of the rip rap on both the upstream and downstream sides of the silt fences." The consultants recommended the two following actions should high rainfall events continue to produce plumes as observed in 2006: 1) a silt curtain be installed in the lake to limit the silt; and, 2) silt fencing be "improved, monitored and maintained while the natural vegetation re-establishes itself." The consultants explained that "the silt fencing within the ditches and around the culverts, as installed after the ditch construction, was insufficiently trenched, and became even less effective after the July rain events." In September 2006, the consultants noted that vegetation introduced on the ditches had begun to become established. They stated that "it should continue to become denser in the coming growing seasons" and predicted reduced sediment loss over time. Photos of the sampling sites are included in the report.

In January 2007, the law firm sent the consultant's report to MNR, the Ministry of the Environment (MOE) and DFO, with a request that the agencies investigate discharge of substances as a result of the work carried out by the township. Through subsequent discussions with these agencies, the law firm learned that a protocol was signed rendering DFO lead agency in sedimentation events. The law firm sent another letter to express concern that this protocol would result in the loss of important distinctions provided by the individual statutes; and that an investigation by DFO cannot reliably ensure that other agencies are informed of breaches of their statutes.

MNR responded by declaring that the township work would have to involve a dam or other structure for them to have jurisdiction under the *LRIA*. DFO claimed no review was necessary since the last investigation of the work did not indicate a HADD. The law firm disagreed with these interpretations of the legislation and provided MNR and DFO with an explanation for their position. MNR and DFO addressed the broader range of responsibilities in subsequent correspondence. MNR added that, according to their Legal Services Branch, they have on occasion used the *LRIA* to deal with sedimentation events.

MNR went on to explain that its staff had followed appropriate procedures for general sedimentation events. The ministry received the complaint, carried out a preliminary investigation, advised DFO of the potential for a sedimentation event impacting fish habitat and left it up to DFO as lead agency to decide the appropriate course of action. The enforcement action in this case was a meeting between the township, MNR and DFO to discuss "what was done and what might be done to prevent future occurrences."

DFO reported to the law firm that its Parry Sound office had been "involved with the site" since late April 2006 and offered the details provided in its letter to the township, i.e., that the township showed due diligence, the works did not violate section 35(1) or section 36(3) of the *FA*, and that DFO considered the matter closed.

Since MNR and MOE are no longer lead agencies on *FA* enforcement, the Environmental Commissioner of Ontario (ECO) recommended that the applicants forward their application to the federal Commissioner for Environment and Sustainable Development (CESD), and the applicants did so. Their application was posted as Petition 209 and, at the request of the applicants, the response to the petition was not published.

Legislative Background:
The *LRIA* is administered by MNR. Among its stated purposes are the protection of natural amenities, perpetuation of fish and wildlife and the protection of the interests of riparian owners. Although the Act primarily addresses human use of lakes and rivers in relation to dams, section 36, in the public rights part of the Act, prohibits the discharge of substances into lakes and rivers in conflict with the purposes of the Act.

The *EPA* and *OWRA* both have sections that prohibit the discharge of a substance that can adversely affect the environment and both require notification if a person causes such an occurrence. The *EAA* requires a municipality to seek approval from the minister before carrying out an undertaking prescribed under the Act unless it constitutes a class environmental assessment with minimal adverse environmental effects. In this case, the municipality must comply with the Municipal Class Environmental Assessment for approval. These three Acts are administered by MOE.

MNR and MOE would be responsible for enforcing these Acts for sedimentation events, were it not for the establishment of an agreement specifying otherwise. In 2004, MNR, MOE, the Ministry of Agriculture and Food, Conservation Ontario, Parks Canada, Environment Canada (DOE), and DFO signed an interim protocol that designated DFO as lead agency in implementing compliance for the fish habitat provisions of the *FA* in Ontario. MNR was designated supporting agency in cases involving habitat destruction and pollution from sediment, while MOE assumed a supporting role in relation to chemical pollution on non-federal lands. DOE was given responsibility for administering the pollution prevention provisions on federal lands or federally-regulated industries, and instances where MOE does not respond.

With DFO as lead agency, the federal *FA* is the overriding legislation protecting fish habitat. The *FA* is potentially a very powerful tool for protecting aquatic habitat. Section 35(1) prohibits any activity that may harm fish habitat, and section 36(3) prohibits the deposition of a substance that "is rendered or is likely to be rendered deleterious to fish or fish habitat" into waters frequented by fish during any part of their life cycle. In theory, the courts can impose fairly tough penalties, up to one million dollars for an indictable offence and the possibility of three years imprisonment for repeat offenders.

However, other sections of the *FA* effectively weaken the power of these prohibitions. For example, the minister may make regulations that authorize the deposition of a deleterious substance under specified conditions, or authorize work that may harm fish habitat provided that acceptable mitigation plans are included. Violators can't be convicted if they "exercised all due diligence" in preventing the offence, or if they "reasonably and honestly" believed in facts (e.g., about the condition of water quality after activities), that would render them innocent. Penalties are reduced if degree of harm appears minimal or if the accused has a good history. Under the *FA*, proponents may voluntarily submit proposals for works or undertakings to ensure compliance, but they are not required to do so.

The 2004 interim protocol was released following an article on the *FA* in our 2001-2002 Annual Report that described enforcement of section 36 as sporadic and inconsistent. Responsibilities for administration and enforcement of section 35(1) and section 36(3) of the *FA* had been exchanged between MNR, MOE and DFO through various agreements since the mid-1970s. The CESD also reviewed the performance of the federal government in protecting fish habitat in the Great Lakes and St. Lawrence River basins in its 2001 Annual Report. The CESD's Report identified a number of required changes, including the need to: adopt a vision and establish clear commitments; clarify roles in managing fresh waters; strengthen management and accountability, and improve federal-provincial relations.

The 2004 protocol assisted agencies in their response to complaints and occurrences. DFO launched the Environmental Process Modernization Plan (EPMP) in the same year as the protocol, to improve efficiency in delivering its habitat responsibilities. The EPMP incorporates a science-based risk management framework that allows resources and efforts to be re-allocated from review of "routine" low-risk projects to those "with the greatest degree of risk to fish habitat of importance to Canadians." The EPMP includes Operational Statements to direct proponents on how to protect fish habitat while carrying out routine projects so that a DFO review is not required. The EPMP was implemented in the 2006/2007 fiscal year and two of the seventeen Operational Statements defined for Ontario have elements that relate to the township work. The "Culvert Maintenance" statement directs users to proceed with a project without a review if that project does not include watercourse re-alignment, culvert extension, replacement dredging, or the filling or excavation of the banks or bed. The "Maintenance of Riparian Vegetation in Existing Rights-of-way" statement says a review is not needed if maintenance is occurring on an existing transportation right-of-way and the root system of the vegetation remains intact.

Another important implication of the establishment of DFO as lead agency is that the *FA*, as federal legislation, can no longer be subject to applications for investigations under the *EBR* because DFO is not a prescribed ministry under the *EBR*. This means that complaints regarding the enforcement of fish and fish habitat laws must be directed as a petition to the CESD. The ECO commented on this implication in our 2004-2005 Annual Report. This disadvantage of the protocol was among four comments received in response to the 2007 Environmental Registry posting of the "Inter-jurisdictional Compliance Protocol for Fish Habitat and Associated Water Quality," a final version of the protocol with the same key roles and responsibilities as the 2004 interim protocol it replaced (see decision review at section 4.22 of this Supplement).

Ministry Responses

Ministry of Natural Resources:
MNR demonstrated consideration for the applicants by alerting them to an anticipated delay of 17 days to address the applicants' supplementary information. The ministry responded after a reasonable period in August 2007, declining to investigate. There were four main reasons cited to justify their decision. First, the ministry determined that the investigation and action already carried out by MNR and DFO officers in 2006 were adequate. The ministry was satisfied with municipal staff's actions and plans "to prevent further occurrences of silt and sedimentation." Second, MNR agreed with DFO that the municipality had shown due diligence. Third, the ministry did not believe there would be "future silt and sediment situations" and cited the consultant's report. Finally, the ministry did not consider the culvert to be a problem since the small size of the stream and inappropriate substrate meant that there was minimal potential for fish spawning. MNR sought DFO's opinion and reported that they were in agreement. The ministry added that the rip rap (i.e., rocks used for erosion control) may actually introduce spawning habitat.

Ministry of the Environment:
MOE provided its response in August 2007 without notifying the applicants of a delay. MOE also declined to investigate, stating that the application contained "insufficient information to show that Township road

construction contributed to a significant discharge of silt to the lake, or that there was a basis for concern over ongoing silt impacts attributable to Township road work." To support its decision, MOE offered DFO's remarks that the township had shown due diligence and that the plume was a natural result, and added that DFO, through follow-up investigations, reported "no fish kill or ongoing habitat or spawning area impacts associated with the silt discharge." According to MOE, DFO visited the construction site "on a number of occasions since May 2006" in "response to public concerns."

MOE also explained that one of the applicants had contacted the Spills Action Centre (SAC) in July 2006 to report emulsion washing off the road surface and forming a plume in Lake Rosseau. Although SAC staff advised the caller to contact the MOE District Office in Barrie, the Barrie office does not have a record of such a call. The ministry added that the alleged plume was not confirmed by the roads department and that no other complaints about the plume were received by the ministry. The Barrie office, upon receiving a request for an investigation into the 2006 silt/sediment discharge from the law firm, referred the complainants to DFO as lead agency and contacted DFO to ensure that the complainants had followed through on the direction.

MOE further explained that since the township work cost less that $1.5 million and involved "no road alignment and dealt solely with the refurbishment or replacement of the road surface and road infrastructure" it was "pre-approved" and did not violate the *EAA*. The ministry informed the applicants of the opportunity to participate in a focus group process for the stormwater management strategy that is currently being undertaken by the District of Muskoka.

ECO Comment

MNR's Responsibilities:
The ECO commends MNR for working with DFO and the township to develop a plan that would prevent future silt and sedimentation occurrences and ensure compliance. These actions showed that MNR was willing to go beyond that required by the 2004 protocol. MNR's rationale for its decision not to investigate under the *EBR* was clear and well-organized, including quotes to assist comprehension. The ministry responded to concerns involving both past and future occurrences and, for one of the applicants' supplementary items, confirmed its analysis through contact with DFO.

However, the ECO finds MNR's rationale incomplete and contradictory in places, particularly in its references to the consultant's report. In addressing the plume in the lake, the ministry accepts DFO's assessment that the source was unrelated to the township work without addressing the contradictory findings by the consultant. On the other hand, MNR relies on the consultant's report for quotes to support its belief that additional occurrences of silt and sediment situations are unlikely, and includes the consultant's recommendation that improvement of the silt fencing is not necessary until rainfall events have created plumes like the one in 2006. The ministry provides this rationale despite written and photographic evidence that there was minimal revegetation at the time of the silt fence removal.

The ECO believes that MNR should have explained to the applicants why they chose to disregard the consultant's findings. The ECO fails to see how excavated and exposed banks with insufficiently trenched silt fences wouldn't lead to an increase in suspended solids in a watercourse, particularly during a storm. The ECO also believes the ministry should have addressed the applicants' concerns regarding sediment deposition in Lake Rosseau at the mouth of the creek, and sediment-laden runoff flowing onto adjacent properties as part of its obligation under the *LRIA*. Furthermore, MNR failed to respond to the applicants' claim that the township had neglected to seek authorization for its proposed construction activities prior to undertaking the work.

MOE's Responsibilities:
MOE did not inform the applicants of the month delay in delivering its decision, a courtesy to which the applicants were entitled. However, MOE did provide a decision summary that addressed the applicants' issues, despite the declaration that DFO was lead agency for issues involving fish habitat. The summary included an informative chronology of events. The ECO commends MOE for informing the applicants of

their opportunity to contribute to stormwater management in the Muskoka Lakes District by joining a municipal focus group.

MOE, like MNR, did not explain why the information in the consultant's report was considered insufficient, or why MOE considered the township to have shown due diligence when silt fences were not maintained. MOE also neglected to address the noise and dust complaints, and the composition of the emulsion. These oversights are not consistent with MOE's SEV commitment to "foster an open and consultative process"; or with MOE's guiding principles of considering cumulative effects and giving first priority to preventing the creation of pollutants that can damage the environment.

Summary:
The ECO appreciates the efforts of MNR and DFO to develop a more "proactive, cohesive and strategic" system of enforcing fish habitat provisions to replace one that was "reactive and fragmented." Although this system has the potential to improve coordination and efficiency in fulfilling fish habitat responsibilities, it may also lead to low-risk cases "falling through the cracks." The incident brought forward by the applicants is a case in point. MNR recognized the work as a potential HADD requiring DFO notification, yet based on information provided in the application, the ministry was not informed by the township before work began, but by public complaint after work had started. Furthermore, none of the government agencies involved considered it necessary to properly trench the silt fences. The level of response suggests that this was considered a low-risk event.

The ECO believes the silt fencing should have been properly trenched and regularly monitored for correct placement. In addition, the fencing should have been left in place until exposed areas were revegetated, as required to prevent contraventions of the *FA*. These are actions recommended in DFO's own fact sheet. Based on the Operational Statements, the risk presented by the township work was not low enough to qualify for exclusion from review. Nevertheless, it would seem that even low-risk projects warrant the maintenance of equipment already in place.

The fact that relatively basic procedures were not followed under what may be perceived as an ideal scenario, where the undertaking is carried out by an informed municipal government agency, concerns the ECO, especially considering the existence of the new EPMP. When township undertakings proceed in this manner, it brings into question the effectiveness of a strategy that relies on individuals to correctly evaluate their project for its potential to harm fish habitat, identify whether the work conforms to an Operational Statement, and take the required mitigating steps if it does. This shift of responsibility onto proponents will undoubtedly result in more subjectivity and greater potential for proponents to contend they exercised due diligence in the absence of ministry input. These shortcomings will put additional pressure on MNR and MOE as supporting agencies to deal with complaints and ensure that fish and fish habitat are protected. MNR and MOE are already vastly overextended, as documented in our 2007 Special Report, "Doing Less with Less."

Finally, the ECO believes the applicants' concern that the protocol masks important distinctions in individual statutes is a valid one. Past applications for investigation under the *EBR* for alleged contraventions of the *FA* show how discrepancies between statutes have complicated enforcement and led to inconsistent application of the law. The ECO plans to monitor how the protocol is implemented and whether this is a problem.

Review of Application I2007007:

6.2.2 Alleged Contravention of the *Aggregate Resources Act* (Investigation Denied by MNR)

Geographic Area: Township of Pringle, District of Nipissing

Background/Summary of Issues

The applicants alleged in September 2007, that the Ministry of Natural Resources (MNR) contravened the *Aggregate Resources Act* (*ARA*) by failing to ensure that the site owner met the statutory requirements for "grandfathering" an established quarry. The definition of an established quarry in section 1(1) of the *ARA* requires that the site owner had removed a "substantial amount of aggregate." The applicants alleged that the site owner failed to meet this requirement. The quarry in question is across the road from the property of one of the applicants. The applicants have not observed any fill material or rock being removed from the site.

The applicants live in an area of northern Ontario that was designated under the *ARA* as of January 1, 2007. This means that if an application for a licence was submitted prior to June 30, 2007, and if the site was considered to be "substantially in business" (as shown by the removal of a "substantial amount of aggregate" within the two-year period prior to the application), the site would be granted an aggregate licence or "grandfathered" under the *ARA*. The applicants however, do not agree that a "substantial amount of aggregate" was removed from the site in question. The applicants also believe that the evidence to support MNR's decision is weak and that it is not appropriate that no public consultation was required prior to the licence being issued. The applicants noted that a number of nearby residents had concerns about the establishment of an aggregate operation at this site and should have had a right to voice these concerns in a formal review process. The applicants were also directed by the ministry to file an application under the *Freedom of Information and Protection of Privacy Act* (*FIPPA*) in order to view the licence application documents regardless of the fact that many of the documents are publicly available under the *ARA*.

Ministry Response

The ministry concluded in November 2007, that an investigation was not required because it was determined that the quarry in question constitutes an "established pit or quarry" for the purposes of the *ARA*. The ministry also noted that there are environmental benefits associated with granting the site a licence, since it brings new environmental protections afforded through the *ARA* and other legislation. The ministry notes that there is no statutory definition of "substantial amount" under the *ARA* and that it is at the discretion of the Minister (delegated to the local MNR aggregate inspector) to determine whether a pit or quarry is an established pit or quarry. The ministry has concerns regarding the disclosure of third-party and personal information and therefore determined that the information requested by the applicants is subject to *FIPPA*.

ECO Comment

The ECO believes that the ministry's decision and rationale to deny the investigation is valid based only on a narrow technical interpretation of the *ARA*. The ECO is concerned that the ministry allowed the site owner to take advantage of the "grandfathering" provision under the *ARA* due to the lack of definition of what constitutes a "substantial amount". The site owner removed a small amount of fill (three loads) and rock (two loads) from the site and produced invoices to substantiate the removal and sale of the material. However, the applicant requested but was denied access to copies of the invoices and alleges that the rock that was removed was taken to the licence applicant's father's pit for testing but was never sold. This allegation, if factual, would put the law in disrepute and has not been followed up on by MNR. The ECO is concerned that the licence appears to have been issued without particularly substantive evidence that the site was an "established pit or quarry." Had the site owner applied for a licence for a new quarry (i.e., MNR did not consider the site to be an established quarry), they would have been required to go through a notification and consultation process that includes an information session for the public as well as other forms of public notification. MNR is also required to post new licence applications on the Environmental Registry for a minimum of 30 days which allows the public another opportunity to comment.

The ECO is also concerned that the applicant was not provided access to information that should be available without making an application through *FIPPA*. The ECO recognizes that personal information must be kept confidential, but in this circumstance, the applicant already knew the name of the licence applicant and being provided with an opportunity to view the licence application would not have changed that fact. If it was the privacy interests of a third party that was an issue, those details could have been removed from the copy of the licence application that was made available to the applicant. MNR is not being open and transparent with public information.

The ECO is also concerned that it took a month or more for the MNR district office to respond to requests for information from the applicant. As discussed in the ECO's Special Report released in April 2007, the ministry does not have enough staff and resources to properly administer the aggregates program. However, it is not clear if that was the reason for the delay in this situation.

The ECO is concerned by the failure of MNR to clarify how it would follow-up on the concerns raised by the applicants. The ministry could have provided the applicant with information as to when a site plan would be expected. In one letter that the applicant received from the minister's office it was stated that an aggregate operator must submit a site plan within six months. This statement is misleading, as was clarified in the ministry's rationale for denying an investigation that "the licensee must serve on the ministry copies of its site plan within six months of the minister serving a demand for such copies on the licensee in accordance with sub-section 71(6)." In other words, the six month timeline does not start until the ministry requests the licence applicant to submit a site plan. Furthermore, MNR had already decided to give operators in newly designated areas 36 months (rather than six months) to submit site plans, and should have shared this information with the applicants.

According to information on MNR's website reviewed in early 2008, a site plan is the primary tool that controls the operation and rehabilitation of all pits and quarries. The licensee is legally bound by the *ARA* to operate and rehabilitate their site in accordance with the site plan. The website goes on to say that the site plans are public information during the application process and can be viewed by any interested party at the local MNR office. In this situation, there is no site plan for the applicant to view and furthermore, the applicant was denied access to view the licence application. More importantly for the local residents, the site plan contains information on where extraction will occur, the types of equipment to be used and the hours of operation. A site plan could also include the need for a berm that would prevent the applicants from being able to see the quarry as well as providing a buffer from the noise.

The ECO feels that this decision does not collectively constitute the best interest of the public of Ontario. MNR has granted this quarry licence based on a very narrow technical interpretation of what constitutes a "substantial amount." If tested in the courts, it is unlikely that three loads of fill and two loads of rock would be considered to be a "substantial amount." MNR has not pursued the allegation made by the applicant that the rock was never sold. This would seem to be a key piece of information when making the decision to grant a quarry licence. MNR is also giving mixed messages about what information is and is not publicly available. Both licence applications and site plans are public information but in this circumstance, the applicant was denied access to the licence application.

Review of Application I2007009:

6.2.3 Alleged Contravention of the *Crown Forest Sustainability Act*, the *Provincial Parks Act*, and the *Provincial Parks and Conservation Reserves Act*

(Investigation Denied by MNR)

Geographic Area: Wabakimi Provincial Park

Background/Summary of Issues

In January 2008, the ECO received an application for investigation, alleging that illegal logging took place in Wabakimi Provincial Park after the area became regulated as a park and that this would be a contravention under the *Crown Forest Sustainability Act*, the *Provincial Parks Act* and the *Provincial Parks and Conservation Reserves Act*. The allegation was based upon a review of publicly available satellite images that showed what the applicants believed to be logging in the southern area of the park. The applicants did not identify who they thought was responsible for the logging but noted that an area immediately adjacent to the alleged logging area is the Ministry of Natural Resources (MNR) Forest Management Unit 230 – English River Forest, which is managed by Bowater Canadian Forest Products Inc. The applicants did not have any evidence to indicate who may have been responsible for the alleged logging or when it may have occurred. The specific area in question was identified by the applicants by a circle on a satellite map and by latitude-longitude coordinates.

The applicants noted that the area in question was added to the boundary of Wabakimi Provincial Park in July 1997, and acknowledged that the logging in the satellite imagery may have occurred prior to that date. The applicants also acknowledged that the alleged contravention was not identified by the auditors who prepared the 2000-2005 Independent Forest Audit conducted for the English River Forest Management Plan (FMP).

Originally established in 1983, Wabakimi Provincial Park was expanded in 1997, bringing the park to its current size of 892,061 hectares. It is now the second largest park in the Ontario Parks system, the largest being Polar Bear Provincial Park.

Ministry Response

In March 2008, the ministry concluded that an investigation was not required under section 77 of the *Environmental Bill of Rights*. The decision was based on MNR's conclusions that the area in question was logged prior to the expansion of Wabakimi Provincial Park in 1997 and was harvested legally under the approval of an FMP for the Brightsand Forest. The ministry stated that from 1994 to 1997, the area in question (Brightsand Forest) was logged under a Sustainable Forest Licence issued under the *Crown Forest Sustainability Act*. The ministry further noted that the information on this FMP is fully accessible to the public.

MNR's consideration of the application included a review of existing mapping and harvest information but did not include a field investigation. MNR stated that the area was slated for harvest in the 1987/1988 annual work schedule of Great Lakes Forest Products Inc. (the licence holder at that time). MNR further provided mapping that showed harvested areas (depletion map) indicating that harvesting did occur in 1987/1988. MNR indicated that the 1999-2004 Brightsand FMP and the 2004-2009 English River FMP revealed that no access, harvesting or renewal activities had occurred within the expanded park boundary after the expansion was regulated in July 1997.

ECO Comment

The ECO believes that the ministry's decision and rationale to deny the investigation are valid. The ECO notes, however, that the latitude-longitude coordinates and a magnified satellite map provided by the applicants do not coincide with each other and in the opinion of the ECO, the applicants' area of concern is in fact to the east of the coordinates given. MNR understandably focused its investigation on the coordinates as a point of reference presumably believing them to be more accurate than the circled area on the satellite map. Despite this confusion, the area of concern still appears to be within the expanded boundary of Wabakimi Provincial Park and appears to be on the depletion map (mapping that shows harvested areas) as having being harvested in 1988.

SECTION 7

EBR LEAVE TO APPEAL APPLICATIONS

SECTION 7: *EBR* LEAVE TO APPEAL APPLICATIONS

April 1, 2007 to March 31, 2008
Status as of August 2008

Parties and Date of Leave Application

Registry #: IA06E0324
Applicant: Ken Robins
Proponent: Jancal Power Limited
Ministry: Ministry of the Environment (MOE)
Instrument: Permit to Take Water (PTTW), s. 34, *Ontario Water Resources Act* (*OWRA*)
Date Application received by ECO: October 30, 2006

Description of Grounds for Leave Application:

The applicant is appealing the Ministry of the Environment (MOE) Director's decision to grant PTTW No. 8350-6PNJLX to Jancal Power Limited for its hydroelectric dam on the Rocky Saugeen River.

The applicant sought leave to appeal on the following grounds:

1) The Director had indicated to the applicant that the Rocky Saugeen River below the Jancal dam was "at risk" and that he would issue a PTTW for one or two years only in order to facilitate further study to clearly identify the effect of the dam on the river. No scientific data or any other data has been collected that would suggest that the river below the dam is no longer at risk. Therefore, it was unreasonable for the Director to issue a PTTW that has a duration of 10 years.

2) The Director was notified, on several occasions that a detailed water temperature study was being undertaken in the lower Rocky Saugeen River in order to determine the impact of both the operation of the Jancal dam and the Water Management Plan (WMP) for that dam issued by the Ministry of Natural Resources (MNR). The final report was delivered to MOE one week after this PTTW was granted. It is unreasonable that the Director would issue the PTTW without waiting for the results of this detailed water temperature study.

3) The Director did not have any scientific data that showed that the MNR's WMP would work to ensure that the river's coldwater nature and, therefore, the coldwater fishery, would be maintained below the Jancal dam. However, he was provided with data during the summer of 2006 that indicated that the WMP "was not working." The detailed temperature study done in the summer of 2006 indicated that the operation of the Jancal dam in accordance with the MNR's WMP was keeping the water temperatures below the dam too warm to sustain a healthy population of brook trout. Catch rates recorded below the dam have indicated a serious decline of adult brook trout in the past 10 years. It was therefore unreasonable for the Director to take his position in issuing the PTTW.

Date of Leave Decision: March 1, 2007
Decision on the Leave Application:

The Environmental Review Tribunal granted the applicants leave to appeal the Director's decision on all of the grounds asserted by the applicants in their applications.

The Tribunal found that there appears to be good reason to believe that no reasonable person could have made the decision to the issue the PTTW because:

- The PTTW allows pulsing of the river, which creates potential risk of harm to the river's aquatic wildlife and habitat;

- The PTTW does not provide minimum temperature specifications for the discharged water, which has the potential to harm downstream river habitat;
- The decision fails to impose requirements on the PTTW holder to address concerns raised by MNR and others who were consulted on this water taking;
- The decision was based on the assumption that MNR had sole jurisdictional control over the dam, and the Director did not fully discharge his responsibility to independently consider the matters required under O. Reg. 387/04;
- The Director failed to consider the Water Temperature Study, which was available and relevant;
- The decision did not adopt a precautionary approach, nor exercise caution in favour of the environment; and
- The decision to grant the PTTW for 10 years appears unreasonable given the unresolved concerns regarding the potential risk to river habitat and the important information gaps in the Water Management Plan.

Status/Final Outcome:

Applications for Leave to Appeal Granted. A status update teleconference was scheduled for September 16, 2008 according to the ERT website on July 9, 2008.

Parties and Date of Leave Application

Registry #: IA06E0346
Applicant: Sandra Bogan
Additional Applicants: Scott K. Plante, Rocco Matricardi, Yury Churkin, Louis and Erin Laforest, Gilles Chasles, Martin and Annick Guibert, Martin and Kristy Krumins, Harold Moore, Carla Miner, and Vincent Lavoie (on behalf of the Richardson Corridor Community Association, the Stittsville Village Association, NoDump.ca, and Ottawa Landfill Watch)
Proponent: Waste Management of Canada Corp.
Ministry: Ministry of the Environment (MOE)
Instrument: Certificate of Approval (C of A), s. 9, *Environmental Protection Act* (*EPA*)
Date Application received by ECO: December 7, 2006

Description of Grounds for Leave Application:

The applicant sought leave to appeal the decision of the Director to approve an amendment to Certificate of Approval (Air) No. 8-4076-99-006 in order to add a second landfill gas flare, a temporary flare, and an expanded well field to collect landfill gas at the proponent's Carp Road landfill.

The applicant sought leave to appeal on the following grounds:

1) The proponent has neither managed nor resolved the increasing and serious odour problems at the Carp Road landfill; the odour is worse than ever before.

2) Approval to operate the second flare should only be given on a provisional basis in order to allow for the determination, to the satisfaction of the community, that the flare is effective at controlling odour.

3) The Certificate of Approval should include a defined timeline for effective resolution of the odour problems at the landfill, to the satisfaction of the community.

4) The Certificate of Approval also includes air emissions related to the bioremediation of petroleum contaminated soils and the operation of a landfill gas-to-energy facility, but these should be considered independent of the landfill gas flares.

Date of Leave Decision: February 23, 2007
Decision on the Leave Application:

The ERT granted leave to appeal to all of the applicants except Yury Churkin and Martin and Kristy Krumins as these applicants did not substantiate the grounds for their leave to appeal. Leave was granted on two grounds, but not all applicants granted leave rights were granted the right to appeal on both grounds.

Leave was granted to the following applicants on the following grounds:

1) All approved applicants were granted leave to appeal the Director's decision not to address adverse odour effects in the landfill C of A. The ERT observed that the Director's mandate in issuing a C of A is to achieve the standards set out in the *EPA* and O. Reg. 419/05, and therefore, no reasonable person could have decided to issue the C of A without considering measures to prevent the landfill from causing adverse effects from odour.

2) Carla J. Miner was also granted leave to appeal on the ground that predicted landfill emissions for benzene were not assessed in a manner consistent with the MOE's designation for benzene in O. Reg. 419/05. The ERT concluded that the Ambient Air Quality Criteria (AAQC) does not give discretion to assess whether benzene Point of Impingement (POI) concentrations are acceptable, therefore, failure to abide by the AAQC must result in a conclusion that the decision could result in significant harm to the environment.

Status/Final Outcome:

Date of Final Decision: February 22, 2008
Final ERT Decision pertaining to Appeal Application:

In September 2007, the Parties reached a proposed settlement through a mediation process. The ERT issued an Order that set out a process for the Director to circulate the proposed changes to the Amended Certificate of Approval ("the Amended C of A") to the Parties, Participants and Presenters. A teleconference was held in February 2008 to discuss whether the proposed changes to the Amended C of A reflected the settlement agreement reached by the Parties and whether they were consistent with the relevant legislation and are in the public interest.

At the outset of the teleconference, the Parties present informed the ERT that they had resolved the outstanding concerns. The lawyer for the Ministry of the Environment outlined how the settlement agreement was reflected in the Amended C of A and resolved the matters under Appeal. He also indicated that a Provincial Officer's Order issued by MOE in December 2007 required the proponent to install a clay cap and a synthetic liner at the landfill.

The ERT held that the proposed changes to the Amended C of A reflected the settlement agreement reached by the Parties, and were consistent with the relevant legislation and were in the public interest. The Tribunal commended the Parties for resolving the issues and encouraged them to "maintain their spirit of constructive dialogue" when they addressed other issues related to the site. The ERT ordered the Director to make the proposed changes to the Amended C of A and to issue the revised Amended C of A to Waste Management of Canada Corp., and dismissed the appeals.

Parties and Date of Leave Application

Registry #: IA04E0464
Applicants: Hugh and Claire Jenney
Additional Applicants: Diane and Chris Dawber; Sandra Willard; J. Sulzenko; Mark Stratford; Jamie Stratford; Loyalist Environmental Coalition; Lake Ontario Waterkeeper; Gordon Downie; Gordon Sinclair; Robert Baker; Paul Langlois; John Fay; Clean Air Bath; and Janelle Tulloch
Proponent: Lafarge Canada Inc.
Ministry: Ministry of the Environment (MOE)
Instrument: C of A, s. 9, *EPA*
Date Application received by ECO: January 4, 2007

Description of Grounds for Leave Application:

The applicants sought leave to appeal the decision of the Director to issue Certificate of Approval (Air) No. 3479-6RKVHX to Lafarge Canada Inc., which includes approval to use solid non-hazardous waste materials (such as tires, animal meal, plastics, shredded tires, solid shredded materials, and pelletized municipal waste) as an alternative fuel in the manufacturing of cement at Lafarge's Bath plant.

The main grounds for seeking leave to appeal cited by the applicants were as follows:

1) The release of substances from the burning of alternative fuels has the potential to have adverse effects on the environment and human health. Even without the burning of alternative fuels, the Lafarge facility already emits a number of contaminants harmful to humans. The proposed tire-burning activities pose the potential for increased offsite emissions affecting neighbouring landowners, and for significant transboundary environmental impacts.

2) It was unreasonable for the Director to issue the approval given that MOE has not obtained information on local air quality, such as baseline air quality data and information on the potential impact of the emissions on the environment and health.

3) The terms and conditions of the approval do not appear to be adequate to prevent significant environmental harm. Specifically, the approval lacks requirements to consider cumulative effects of exposure to the contaminants emitted from the facility; it lacks sufficient continuous emission monitoring requirements; the emission testing, monitoring and reporting requirements fail to cover the complete list of contaminants; it fails to adequately address the potentially large amounts of fugitive dust, gases and particulate matter that may be generated by the project; it lacks adequate conditions to monitor and control odour emissions; and it fails to require routine testing of the alternative fuel materials to ensure that these do not stray outside the approved parameters.

4) It appears that MOE has not included conditions that would assist MOE in obtaining answers to the very questions it purports to seek through this test-project, making this decision unreasonable. MOE does not have the baseline air quality data needed to determine the impacts of the pilot test project on the health of the local community.

5) Permitting the tire-burning at Lafarge's plant, while prohibiting it elsewhere in the province is inherently contradictory, disregards the government's own policy on tire-burning, and is unfair to the community of Bath. This decision is particularly unreasonable given MOE's admission that it "lacks experience monitoring the environmental performance of facilities that incinerate tires."

6) The decision to issue the approval took place behind closed-doors and violated the government's obligations for accountability and transparency.

7) In issuing the approval, the Director failed to properly take into account the ecosystem approach, promote resource conservation, and apply the precautionary principle, as required by MOE's Statement of Environmental Values.

Decision Date: April 4, 2007
Decision on the Leave Application:

The Tribunal granted the following applicants leave to appeal the decisions to issue amended Certificate of Approval (Air) No. 3479-6RKVHX pursuant to section 41 of the *EBR:* Susan Quinton on behalf of Clean Air Bath; Martin Hauschild and William Kelley Hineman on behalf of Loyalist Environmental Coalition; Lake Ontario Waterkeeper and Gordon Downie; and Gordon Sinclair, Robert Baker, Gordon Downie, Paul Langlois and John Fay.

The applicants were permitted to appeal this decision and the related waste disposal site approval decision in their entirety; the scope of the Appeal was not limited to the grounds on which the Applications have been granted or to the issues raised by the applicants in their applications for Leave to Appeal, unless the Tribunal orders otherwise.

Diane and Chris Dawber, Hugh and Claire Jenney, Mark Stratford, Jamie Stratford, J. Sulzenko, Janelle Tulloch and Sandra Willard had applied for leave to appeal the related Certificate of Approval (Air) issued to Lafarge, but did not specifically request leave to appeal this C of A (Waste Disposal Site) in their leave to appeal notices. Nonetheless, the Environmental Review Tribunal considered their request for leave to appeal both of the related Cs of A. The Tribunal denied leave to appeal to these nine applicants of both Cs of A on the grounds that they did not establish that their concerns "have a real foundation sufficient to give them the right to pursue them through the appeal process," and thus they did not meet the section 41 leave to appeal test.

According to the ERT's case management protocol, this case was renamed *Dawber* v. *MOE* after the leave to appeal decision was released.

Status/Final Outcome:
Preliminary Hearing scheduled for September 2008.

Additional Information:

In September 2007, Lafarge Canada Inc. applied for a judicial review to Divisional Court, seeking to set aside the April 2007 ERT decision. The litigation sought to judicially review the Tribunal's decision on the grounds that the Tribunal erred in law by misinterpreting and misapplying the test for leave to appeal in Part II of the Act (section 41) and by misinterpreting the role of the SEV, in particular the finding that the SEV was part of the "relevant law and …government policies to guide the decisions of the Director."

In November 2007, Commissioner Miller announced that his office would be applying to intervene in the Divisional Court hearing as a friend of the court to explain why he believed that the ERT made correct findings on the application of the SEVs to MOE's instrument decisions. Although the ECO's initial application for leave to intervene filed in February 2008 was rejected, the ECO appealed to a full panel of Divisional Court. The ECO was granted intervention status only five days before the Divisional Court hearing commenced in April 2008.

In mid-June 2008, the Divisional Court ruled that the ERT had acted reasonably in granting leave to appeal. The court agreed with the submissions made by the lawyers for the environmental groups and the ECO that MOE's SEV should be considered applicable policy by the Tribunal. It also was reasonable for the ERT to conclude that MOE should have considered the ecosystem approach and the precautionary principle as set out in MOE's SEV. In addition, the court ruled that the standard of proof for leave to appeal applications under s. 41 of the *EBR* is less than a balance of probabilities (the usual standard in civil law trials), and close to the prima facie case standard set out in the *Barker v. MOE* decision issued by the Environmental Appeal Board in 1996.

In early July 2008, Lafarge filed an application for leave to appeal the Divisional Court decision with the Ontario Court of Appeal. Prior to the leave application, it was expected that the ERT hearing scheduled for September 2008 would resume as planned. The ECO hopes to report on this case in our 2008-2009 Annual Report.

Parties and Date of Leave Application

Registry #: IA03E1902
Applicant: Clean Air Bath
Additional Applicants: Loyalist Environmental Coalition; Lake Ontario Waterkeeper; Gordon Downie; Gordon Sinclair; Robert Baker; Paul Langlois; and John Fay
Proponent: Lafarge Canada Inc.
Ministry: Ministry of the Environment (MOE)
Instrument: C of A, s. 27, *EPA*
Date Application received by ECO: January 4, 2007

Description of Grounds for Leave Application:

The applicant sought leave to appeal the decision of the Director to issue Certificate of Approval (waste) No. 8901-R8HYF to Lafarge Canada Inc. to operate a waste disposal site at its Bath cement manufacturing plant to allow the acceptance, processing and incineration of non-hazardous solid waste at a rate of less than 100 tonnes per day.

The main grounds for seeking leave to appeal the decision by the applicants are as follows:

1) The landfill on the Lafarge property already generates large amounts of leachate that discharges into the Bath Creek. The disposal of alternative fuel waste and cement kiln dust at Lafarge's landfill may result in additional loadings of landfill leachate into the already impaired groundwater and sourcewater resources.

2) It was unreasonable for the Director to issue the approval given that MOE has not obtained information on local watershed conditions, such as the extent of surface water and groundwater contamination.

3) The terms and conditions of the approval do not appear to be adequate to prevent significant environmental harm. Specifically, there is not a sufficiently clear prohibition of the types of waste that can be collected; and there are not sufficient conditions requiring sampling and disposal of the resulting cement kiln dust and landfill leachate.

4) The Design and Operation Manual referred to in the approval was produced and supplied to MOE well after the close of the *EBR* comment period and just before the approval was issued. Moreover, the manual does not include sufficiently detailed requirements.

5) The large volume of alternative fuel waste being permitted in the approval goes far beyond what is reasonable for a limited pilot project.

6) In issuing the approval, the Director failed to properly take into account the ecosystem approach, promote resource conservation, and apply the precautionary principle, as required by MOE's Statement of Environmental Values.

Date of Leave Decision: April 4, 2007
Decision on the Leave Application:

The Tribunal granted the following applicants leave to appeal MOE's decision to issue Certificate of Approval (Waste Disposal Site) under section 27 (and s. 39) of the *EPA* ("waste C of A"): the Loyalist Environmental Coalition; Lake Ontario Waterkeeper; Gordon Downie; Gordon Sinclair; Robert Baker; Paul Langlois; John Fay; and Clean Air Bath.

The applicants were permitted to appeal this decision and the related s. 9 C of A decision in their entirety; the scope of the appeal shall not be limited to the Grounds on which the Applications have been granted or to the issues raised by the applicants in their applications for Leave to Appeal, unless the Tribunal orders otherwise.

The Tribunal found that these applicants met the first branch of the leave to appeal test on the grounds that it appears that there is good reason to believe that no reasonable person could have made the decision to issue the C of A under the following circumstances:

- The Director did not assess the potential cumulative ecological consequences of approving the C of A application. The Tribunal noted that the mere fact that the C of A complies with O. Reg. 419/05 is not sufficient to establish that the decision to issue the C of A is reasonable, or to establish that MOE has taken an ecosystem approach in making its decision, as required by MOE's SEV.
- The Director did not follow the direction in MOE's SEV to apply a precautionary approach. The Tribunal noted that the Cs of A were approved in the face of uncertainty by MOE about the environmental risk of the permitted activity (as evidenced by MOE's Notice of Proposal for a Regulation to ban the incineration of tires).
- The Director did not turn its mind to the potential effect of the decision on the common law rights of local landowners.
- The Director's decision exposes the residents of Bath to the effects of an activity (i.e., the incineration of tires) that the MOE is proposing to ban in the rest of the province, without considering whether such a decision could produce inconsistent environmental effects between communities.

The Tribunal also found that the applicants provided sufficient information to establish that the Director's decision to issue the C of A could result in significant harm to the environment. The Tribunal noted that, despite the fact that MOE has concluded that the facility is able to operate in accordance with O. Reg. 419/05, MOE regulations do not incorporate consideration of cumulative effects, total ecosystem loading, synergistic effects, bioaccumulation or complete standards for high priority contaminants. In addition, the information supporting the C of A application did not include baseline information for air and water quality.

According to the ERT's case management protocol, this case was renamed *Dawber* v. *MOE* after the leave to appeal decision was released.

Status/Final Outcome:
Preliminary Hearing scheduled for September 2008.

Additional Information:

In September 2007, Lafarge Canada Inc. applied for a judicial review to Divisional Court, seeking to set aside the April 2007 ERT decision. The litigation sought to judicially review the Tribunal's decision on the grounds that the Tribunal erred in law by misinterpreting and misapplying the test for leave to appeal in Part II of the Act (section 41) and by misinterpreting the role of the SEV, in particular the finding that the SEV was part of the "relevant law and …government policies to guide the decisions of the Director."

In November 2007, Commissioner Miller announced that his office would be applying to intervene in the Divisional Court hearing as a friend of the court to explain why he believed that the ERT made correct findings on the application of the SEVs to MOE's instrument decisions. Although the ECO's initial application for leave to intervene filed in February 2008 was rejected, the ECO appealed to a full panel of Divisional Court. The ECO was granted intervention status only five days before the Divisional Court hearing commenced in April 2008.

In mid-June 2008, the Divisional Court ruled that the ERT had acted reasonably in granting leave to appeal. The court agreed with the submissions made by the lawyers for the environmental groups and the ECO that MOE's SEV should be considered applicable policy by the Tribunal. It also was reasonable for the ERT to conclude that MOE should have considered the ecosystem approach and the precautionary principle as set out in MOE's SEV. In addition, the court ruled that the standard of proof for leave to appeal applications under s. 41 of the *EBR* is less than a balance of probabilities (the usual standard in civil law trials), and close to the prima facie case standard set out in the *Barker v. MOE* decision issued by the Environmental Appeal Board in 1996.

In early July 2008, Lafarge filed an application for leave to appeal the Divisional Court decision with the Ontario Court of Appeal. Prior to the leave application, it was expected that the ERT hearing scheduled for September 2008 would resume as planned. The ECO hopes to report on this case in our 2008-2009 Annual Report.

Parties and Date of Leave Application

Registry #: 010-0066
Applicant: John W. Spellman
Proponent: Creekside Hunting and Fishing Club
Ministry: Ministry of the Environment (MOE)
Instrument: PTTW, s. 34, *OWRA*
Date Application received by ECO: July 20, 2007

Description of Grounds for Leave Application:

The applicant appealed the Director's decision to issue permit to take water (PTTW) No. 0366-6YVNY4 to the Creekside Hunting and Fishing Club for recreational purposes. The PTTW would affect the Big Creek Wetland, a Lake Erie coastal wetland located east of the confluence of the Detroit River and Lake Erie, near Amherstburg, Ontario. The wetland is designated a Provincially Significant Wetland (PSW) by the Ministry of Natural Resources (MNR) and a Globally Significant Important Bird Area by BirdLife International.

The applicant sought leave to appeal on nine grounds, including the following seven grounds:

1) By granting the permit, the Director failed to protect the quality of the natural environment and foster the efficient use and conservation of resources.

2) The Director failed to obtain wetland and ecosystem data prior to issuing the permit. The decision was based on insufficient data. The Director did not examine the cumulative effects of the water taking or the health of the wetland or watershed.

3) The decision to issue a permit was contrary to the MOE's Statement of Environmental Values. It did not have regard to the ecosystem approach or the precautionary principle, or use science that meets the high standards of the scientific community.

4) The PTTW does not include a meaningful monitoring protocol.

5) The five-year term of the PTTW is too long given the absence of a watershed study.

6) The consultation process was minimal and inappropriate in light of the concerns of stakeholders and the proponent's performance record.

7) The Director did not include the water taking by the dam operated by the proponent for the water quality calculations and conditions of the PTTW.

The applicant provided several affidavits and lengthy submissions and arguments in his application.

Date of Leave Decision: November 27, 2007
Decision on the Leave Application:

The Environmental Review Tribunal (ERT) denied this application for leave to appeal.

ERT noted that the applicant cited nine grounds in support of his application including that: the Director failed to protect the natural environment; the decision was based on incomplete data; and the PTTW term was too long and lacked a monitoring condition.

The ERT considered the submissions as to whether the applicant met the two-pronged test for Leave to Appeal outlined by s. 41 of the *EBR* for each ground of his appeal. Under the first prong, the Tribunal held that the applicant failed to establish there is reason to believe that no reasonable person could have decided to issue the PTTW while having regard for the relevant law and government policies.

With respect to the second prong, the Tribunal found that the applicant failed to establish that the Director's decision to issue the PTTW could result in significant harm to the environment. The ERT held that the Director acted on sufficient information, and the PTTW contained adequate conditions to identify and minimize the risks associated with the water taking.

The ERT dismissed the hunting club's claim for costs against the applicant, stating that the applicant's actions were "not unreasonable, frivolous, vexatious, made in bad faith, and/or knowingly false and misleading. " The Tribunal emphasized that failing to meet the test under s. 41 of the *EBR* was "not synonymous with acting unreasonably," and went on to note that the applicant provided "relevant scientific materials in support of his position and raised arguments that were relevant to the matter which the Director was required to consider."

Additional Information:

The day after the Tribunal released its decision, counsel for MOE wrote to ERT and indicated that he had learned from MNR that the creek was indeed a navigable water according to Ontario law and policy. This contradicted the position taken by MOE in its submissions to ERT. However, counsel for the MOE insisted that "even if this new information had been available" to ERT prior to its decision it would not have affected the outcome.

In early December 2007, the applicant wrote to counsel for the MOE and noted a number of irregularities in the evidence that was presented to ERT. (A copy of the applicant's letter also was forwarded to the ECO and the ERT.) He also expressed serious concerns about some of the findings made by ERT. The applicant noted in his letter that "there has never been a single piece of compelling evidence from the hunt club" in support of its unsubstantiated claim that it owns the bed of this navigable creek. The club has not shown "by any legally persuasive documentation that the Big Creek is not navigable and that therefore the hunt club is entitled to prohibit the public from navigation in the Southern portion of the creek. Until and unless the hunt club produces such compelling evidence to the legal divisions of the relevant provincial ministries or can produce a court decision supporting their claims, their assertions of private ownership of Crown property must be fully and firmly rejected at all levels of decision making."

The applicant went on to state that MOE made its decision on the terms and conditions of the permit "without the accurate knowledge to reflect Crown ownership and the public rights which flow from that. On the contrary, in its Decision, the ministry asserted that it relied on the hunt club's assertion of private ownership of the waters and beds of water as partial justification for the permit as issued. The Tribunal Decision states, (page 26) "The Director maintains that the Big Creek Wetland does not contain a navigable waterway, as the wetland basin is very shallow and there is no defined creek channel. Finally the MOE Director asserts that there is no public right to fish… [and] contends that the Hunt Club owns the creek bed located on its property, and as such the public does not have a right to fish in these areas on property owned by the Hunt Club."

The applicant went on to describe some other serious flaws in the ERT decision, and asserted that the interpretation offered by the Tribunal on key aspects of the *EBR* appeared inconsistent with the goals of the *EBR* to provide public access and promote transparent decision-making. However, the applicant decided, after weighing the various advantages and disadvantages involved, not to apply to the ERT for reconsideration of its November 2007 decision.

Parties and Date of Leave Application

Registry #: IA05E1762
Applicant: Alan Marshall
Proponent: Chemtura Canada Co.
Ministry: Ministry of the Environment (MOE)
Instrument: Consolidated C of A
Date Application received by ECO: October 31, 2007

Description of Grounds for Leave Application:

The applicant sought leave to appeal the decision of the Director to issue a Consolidated Certificate of Approval (C of A) No. 2289-6Y2HNA to Chemtura Canada Co. ("Chemtura") The Consolidated C of A approved the combined operation of Chemtura's existing groundwater collection and treatment systems in a new single integrated system. The system is designed to collect and treat contaminated groundwater on Chemtura's property.

The C of A also consolidated separate on-site and off-site treatment for contaminated groundwater in the Town of Elmira. The applicant was concerned that a relaxation of the requirement of on-site contaminated groundwater containment would preclude the town's municipal aquifer from meeting Ontario's drinking water standards.

The eight grounds for the applicant seeking leave to appeal included the following six grounds:

1) The C of A does not impose appropriate conditions to ensure full hydraulic containment. The C of A requires Chemtura to maintain full hydraulic containment between two onsite wells – OW58 on the north-west border and OW105 on the south-west border. Yet, the C of A approves the shutting down of PW1 – the only pumping well located in the northwest portion of the site. In addition, it also allows Chemtura to reduce another pumping well (PW4) to 1.5 litres/second during construction. The applicant argues that a minimum pumping rate of 2.5 litres/second is required to achieve local containment around well PW4.

2) The interim pumping conditions are inadequate. In addition to allowing PW4 to pump at a reduced rate during construction, the new pumping well PW5 will not be pumping at all during

construction. The interim pumping conditions may result in a gross loss of hydraulic containment on-site during the six, or possibly many more, months of construction.

3) The criteria that are being used by Chemtura to determine hydraulic containment are inadequate. The wells chosen to monitor containment are entirely inappropriate as they are located directly beside the pumping wells, which will provide inaccurate measures of contaminant levels.

4) The new C of A actually reduces the level of protection provided in the ministry's 1991 Control Order, as the new C of A removes the legal requirement for Chemtura to keep the contaminated groundwater on-site, and it reduces the criteria (groundwater contours, concentration trends, well pair elevation comparisons and pumping rates) used for contaminant trends.

5) The applicant believes that a particularly "tight" C of A is required in this case because: 1) full hydraulic containment (as required by the 1991 Control Order) has still not been achieved; 2) the MOE has not done anything about this failure, undermining the applicant's confidence in the MOE's control documents; and 3) highly contaminated groundwater remains in the aquifer and continues to leak offsite.

6) The ministry did not adequately consider the concerns of the members of the Chemtura Public Advisory Committee in developing the conditions of the C of A.

Date of Leave Decision: March 4, 2008
Decision on the Leave Application:

The Environmental Review Tribunal (ERT) dismissed this application for Leave to Appeal.

The ERT considered whether the applicant met the two-pronged test for Leave to Appeal outlined under section 41 of the *EBR*. Under the first part of the test the ERT evaluated the eight grounds of appeal and found that the applicant failed to establish that no reasonable person, having regard to relevant laws and policies, would issue the C of A for seven of the grounds. In regards to Ground 3 that alleged the well locations and well pairing in the C of A are inappropriate for measuring and maintaining containment, the ERT agreed with the applicant.

However, the ERT went on to rule that the applicant failed to satisfy the second part of the test set out in section 41. Based on the evidence reviewed by ERT, it did not appear to the panel that the well pairing decision could result in significant environmental harm. Furthermore, the ERT stated there were a number of mitigating provisions in the C of A to counter potential harm to the environment of a limited migration of contaminated groundwater off-site from the core contaminated area.

Parties and Date of Leave Application

Registry #:	010-1759
Applicant:	Joan Lever
Proponent:	Strada Aggregates Inc.
Ministry:	Ministry of the Environment (MOE)
Instrument:	PTTW, s. 34, *OWRA*

Date Application received by ECO: February 2, 2008

Description of Grounds for Leave Application:

The applicant appealed the Director's decision to revise conditions 3.4 and 3.9 of the existing Permit to Take Water (PTTW) No. 8277-6HYN9S issued to Strada Aggregates Inc. in Barrie, Ontario. The permit expires on November 30, 2015 and is for the purpose of an aggregate washing and concrete batch plant for the Melancthon II Wind Project.

The applicant sought leave to appeal on the following grounds:

1) A full scale environmental assessment should have been conducted prior to the approval of the PTTW. The cumulative impact of long-term water taking on local water sources and ground water studies should also have been considered before the permit was issued.
2) The applicant relies on well water for her drinking water supply and has noticed a decrease in local water levels.
3) The area provides habitat for a diverse array of wildlife. This area has not undergone study and may be threatened by the water taking and wind turbine construction.
4) The oil used for the turbines may contaminate the environment.
5) There are other development pressures in the area that are industrializing the rural landscape, and using water resources.

Date of Leave Decision: February 8, 2008
Decision on the Leave Application:

The applicant withdrew her application for Leave to Appeal in this matter. As a result, the Tribunal dismissed the proceedings.

Parties and Date of Leave Application

Registry #: 010-1607
Applicant: Sierra Club of Canada
Additional Applicants: Greenspace Alliance of Canada's Capital
Proponent: Findlay Creek Properties Ltd. and 1374537 Ontario Ltd.
Ministry: Ministry of the Environment (MOE)
Instrument: PTTW, s. 34, *OWRA*
Date Application received by ECO: March 11, 2008

Description of Grounds for Leave Application:

The applicant sought leave to appeal the Director's decision to issue permit to take water (PTTW) No. 1446-76SP2H to Findlay Creek Properties Ltd. and 1374537 Ontario Ltd. The PTTW was issued for taking water for construction dewatering during installation of water and sewer mains at the Findlay Creek Village subdivision. The applicant sought leave to appeal sections 3.1 (Expiry), 3.2 (Amounts of Taking Permitted) and 4.2 (Monitoring) of the PTTW.

The applicant sought leave to appeal on the following grounds:

1) The decision to issue the PTTW is contrary to the Ministry of the Environment (MOE)'s Statement of Environmental Values.
2) The decision to issue the PTTW disregards sections 2.1.1, 2.1.2, 2.1.3 and 2.1.6 of the Provincial Policy Statement 2005, contrary to section 3 of the *Planning Act*.

3) The decision fails to protect and conserve the biological, ecological and genetic diversity of the Leitrim Wetland, a provincially significant wetland.

4) MOE failed to undertake a comprehensive and meaningful assessment of the cumulative effects of successive water takings on the Leitrim Wetland.

5) MOE failed to require the proponent to develop a water budget and failed to consider all relevant hydrogeologic and geologic data in the proponents' possession.

6) MOE failed to use science that meets the high standards of the scientific community.

7) MOE failed to exercise the precautionary approach.

8) MOE failed to foster an open and consultative public participation process by failing to disclose relevant hydrogeologic data to the applicants.

Date of Leave Decision: Not available
Decision on the Leave to Appeal Application:

ERT had not made a decision on this application as of July 9, 2008.

Parties and Date of Leave Application

Registry #: 010-2479
Applicant: John Miller
Proponent: Cameco Corp.
Ministry: Ministry of the Environment (MOE)
Instrument: PTTW, s. 34, *OWRA*
Date Application received by ECO: March 26, 2008

Description of Grounds for Leave Application:

The applicant is appealing the Director's decision to issue PTTW No. 6025-7BHRJH to Cameco Corporation for its Port Hope uranium conversion facility. The PTTW was issued on February 12, 2008, and the decision was loaded on the Environmental Registry on March 12, 2008.

The applicant sought leave to appeal on the following grounds:

1) Cameco Corp. has been deemed "deficient" in its environmental practices by the Canadian Nuclear Safety Commission (CNSC), and has not satisfactorily cleaned up contaminated soil from a spill on its property.

2) The CNSC has asked Cameco for further data to determine whether the company has met its obligations under the General Nuclear Safety Regulations. By granting the PTTW, the Ministry of the Environment may be complicit in allowing Cameco to avoid its responsibility to clean up its toxic spill.

3) MOE failed to review the CNSC report, records of water-takings on the property, the PTTW manual and other key documents outlining the environmental problems at the Cameco property.

4) Cameco failed to consult the community about its remediation plans for the spill.

5) According to MOE's PTTW manual, Cameco should be applying for a new permit, not an amendment to an existing permit.

6) The water taking has the potential to cause significant environmental harm. In addition, there is an issue of the contaminated soil on the property. No study has been conducted into the impact of the water vapour release to the atmosphere, the impact of the taking on the shoreline, or the impact of reversing the flow of water from the lake into the property below the water table. There are also concerns regarding the electricity required to convert water into vapour, and the emissions from the plant, especially uranium.

Date of Leave Decision: May 28, 2008
Decision on the Leave to Appeal Application:

The Environmental Review Tribunal dismissed the application for leave to appeal because it was not filed with the Tribunal within 15 days of the decision notice being posted on the Registry as required by section 40 of the Environmental Bill of Rights.

The applicant sent his application by courier; however, the package sent to the ERT was lost by the courier and did not arrive until after the deadline. The other recipients, including the ECO, received the application for leave to appeal before the deadline. The applicant submitted his receipts to the ERT confirming that four copies were sent by priority courier before the deadline.

The ERT invited the parties to make submissions as to whether it had jurisdiction to adjudicate an application received after the 15-day deadline. After reviewing the arguments the ERT decided that section 40 requires that the ERT actually receive the application on or before the deadline. The ERT stated that an applicant cannot rely on inefficient delivery services as a reason to extend a statutory time limit, and the Tribunal rules cannot override a statutory requirement or limitation. The ERT also ruled that a legislative amendment would be necessary to provide an ERT panel with the authority to extend the statutory deadline in the *EBR*.

On June 7th, 2008, the applicant wrote to the ERT and requested a reconsideration of its decision within the 10-day period allowed and according to Rules 227, 228 and 230 of the ERT Rules of Practice. He argued specifically that there was new evidence not available to him at the time of his submissions that he believed "would cause the Tribunal to reach a different decision." He respectfully asked the Tribunal to consider this evidence on its merits and reconsider its decision on his leave to appeal application.

In his application for reconsideration, Mr. Miller noted the following:

1) As of June 2008, when someone visits the 15th floor of 655 Bay St., there is a large, clearly marked sign informing visitors about the various provincial regulatory bodies that are located at the address, including the ERT and the Ontario Municipal Board (OMB).

   The applicant stated this was not the case on March 24, 2008 because he attended at ERT with his LTA application in hand, intending to drop it off well in advance of the deadline. The office was closed because it was Easter Monday, and the applicant noted that he "thought I must be in the wrong place. The only signage on the office was for the Ontario Municipal Board. There was a small sign saying "Courier" pointing down a corridor. No sign said this was the address of the Environmental Review Tribunal. Nor was there any listing for the agency on the information kiosk in the downstairs lobby." In the absence of proper signage, it is possible that a courier would not have known that the ERT office was located on the 16th floor of the same building and was sharing services with the OMB.

   Rather than return the following day, the applicant double-checked the mailing address and decided to use Canada Post Xpresspost courier service, because he reasoned he would have a record of his package "being delivered to the right place." The applicant went on to note that he had not known, until recently, "that the ERT moved to 655 Bay St. only shortly before the dates in question. This – and the absence of signs that I noted on March 24 – suggests that a series of unfortunate events may have caused the problem of my application not being delivered to the Tribunal on time. One of those, of course, is the unexplained failure of Canada Post to deliver the package. But another was the absence of signage for your agency, due to the recent move of your office."

2) The applicant noted that he visited the 15th floor office to investigate this on June 4, 2008 and asked about the new signage. The receptionist he spoke to on June 4th confirmed that the ERT had moved to the 16th floor of 655 Bay on March 3rd, but the signage had not been put up until "after April 1." The receptionist added that "the new signs had cleared up a lot of confusion, including mail delivery problems."

   The applicant also stated that there was "some evidence that Canada Post may have tried to deliver my package on March 26 and encountered the same problem I did on March 24th. Canada Post was noncommittal, mostly because it did not trace my Xpresspost as requested when he reported it missing. The voice tracking system still does not say that it was ever delivered." Canada Post also failed to explain to the applicant why, when he posted "all four packages at the same time at the same downtown Toronto post office, the one addressed to the Tribunal was the only one that was sent to the Gateway postal terminal in Mississauga. The timing was also significant. The other packages were all delivered in the morning of March 26, but the Tribunal's package was not "processed" in Mississauga until 2.14 p.m. that day."

3) The applicant also obtained an independent opinion from a retired Canada Post staff member, Mr. Bob Jackson. Mr. Miller stated that these facts about signage "were noted as significant by Bob Jackson, who retired this year to Port Hope after 32 years at Canada Post and has intimate knowledge of the courier protocols." Mr. Jackson went on to advise the applicant that if ERT "didn't have signage up in the building it likely would have been marked undeliverable." The applicant went on to state that "Canada Post's policy is to return the package to sender after one attempt to deliver it. That would have sent it to Gateway in Mississauga sometime in the afternoon of March 26."

4) The applicant also noted the first leave to appeal case filed in Ontario, *Hunter* v. *Ontario* (Ministry of the Environment and Energy), 1995. In that case, the Environmental Appeal Board (which was the predecessor tribunal to the ERT and heard *EBR* LTA applications until 2000) appeared willing to consider fax receipt at the ECO as proof of delivery. However, in that case, the tribunal concluded that it was unnecessary to explore this hypothetical question because the MOE had failed to prove it posted its decision notice on the day in question in 1995.

On June 27, 2008, ERT released its decision on the reconsideration application. ERT reaffirmed the original decision that the Tribunal had no jurisdiction to adjudicate the matter.

Parties and Date of Leave Application

Registry #: IF07E1001
Applicant: Ken McRae
Proponent: United Counties of Stormont, Dundas and Glengarry
Ministry: Ministry of Municipal Affairs and Housing (MMAH)
Instrument: Approval of an Official Plan Amendment - *Planning Act* s. 17(34) and s. 21
Date Application received by ECO: May 22, 2007

Description of Grounds for Leave Application:

There were two available routes to challenge this decision of the Minister of Municipal Affairs and Housing to approve Official Plan Amendment (OPA) No. 2 adopted by the United Counties of Stormont, Dundas and Glengarry: (1) by an application for leave to appeal under the *Environmental Bill of Rights, 1993* (*EBR*); or (2) by appealing the decision under the *Planning Act* to the Ontario Municipal Board (OMB).

The applicant filed a leave to appeal application for this instrument under the *EBR* with the Environmental Review Tribunal on May 16, 2007, which was prior to the 15-day deadline under the *EBR*. The applicant set out the following grounds for seeking leave to appeal:

1) The OPA violates Provincial Policy Statements (PPS). The proposal notice states the purpose of the OPA is to identify the subject lands as a Special Policy Area, recognize it as a Provincially Significant Wetland (PSW) and establish site-specific policies aimed at minimizing negative impacts to the environmental features prior to permitting development on the subject lands. The OPA also re-designates a portion of the PSW to Residential District. The appellant argues that the changes grossly contradict each other. Sections 2.1.3 and 2.1.4 of the 2005 PPS state that development and site alteration shall not be permitted in PSWs, Significant Coastal Wetlands, valleylands or in significant wetland habitat. The appellant states that the Bainsville Bay Marsh, subject to the OPA, contains all of these environmentally significant features.

2) The OPA contradicts the Canada-Ontario Agreement Respecting the Great Lakes Basin Ecosystem (COA). The purpose of COA is to build on the commitment of the parties to restore, protect and conserve the Basin Ecosystem. The Bainsville Bay Marsh is located in a basin designated as being an Area of Concern and is covered by a remedial action plan.

3) The OPA contradicts MMAH's Statement of Environmental Values.

4) The OPA contradicts O. Reg. 175/06 - Raisin Region Conservation Authority: Regulation of Development, Interference with Wetlands and Alterations to Shorelines and Watercourses Regulation made under the *Conservation Authorities Act*.

5) The OPA violates parts of the 2005 Official Plan for the United Counties of Stormont, Dundas and Glengarry, adopted on July 18, 2005. Section 5.04 of the Official Plan states that one of its objectives is to "conserve, protect and enhance the natural environment including natural heritage features and areas."

6) Kemptville District Office of the Ministry of Natural Resources opposed the proposed re-designation of a portion of the Bainsville Bay Marsh from provincially significant wetland to residential district.

Date of Leave Decision: May 31, 2007
Decision on the Leave Application:

The application for leave to appeal should have been made to the Ontario Municipal Board (OMB), not to the ERT. ERT staff alerted the applicant about his mistake but only after the 15-day deadline to apply for leave to appeal under the *EBR* had passed.

The applicant subsequently forwarded his application for leave to appeal to the OMB by e-mail. The OMB's rules do not contemplate service by e-mail. Supporting documentation was not included with the LTA application and MMAH and the United Counties were not served with the request. In a letter dated May 22, 2007, counsel for MMAH requested OMB to inform them whether this matter was properly before the OMB before they filed responding materials.

On May 31, 2007, counsel for the OMB wrote to the applicant stating that his application had been improperly filed and could not be adjudicated by the OMB.

Additional Information:

Following the OMB's decision on the *EBR* leave to appeal application, MMAH staff and others advised the applicant that it would still be open to him to file a regular appeal under the *Planning Act*. Mr. McRae filed his appeal shortly thereafter.

In November 2007, the OMB scheduled a three-day hearing on this dispute for February 2008. At the request of the parties, the three-day hearing scheduled to commence February 27, 2008 was converted to a one-day mediation.

Negotiations took place on February 27, 2008 which resulted in amended wording to the text of the Official Plan that satisfied all of the Parties and Participants. Thus the Board proceeded to hear evidence later that day concerning the OPA as amended, and allowed Mr. McRae's appeal to the extent necessary so as to approve the amended OPA.

In its reasons, the OMB concluded that the amended OPA implemented provincial policy by protecting the natural environment in the following ways:

1) It recognizes the sensitive nature of the shoreline. Thus, all development proposals in the Special Policy Area "shall be consistent with" the Provincial Policy Statement, 2005 and strive to protect the natural heritage and the significant wetlands of the SPA, paying particular attention to:

    - the impact on fish habitat and natural hazards;
    - the quality of ground and surface water which shall be protected through conditions of development approval; and
    - potential natural hazards, ensuring that new hazards and adverse environmental effects are not created and that existing hazards are not aggravated.

2) All development proposals undertaken within the Special Policy Area also will require protective measures to mitigate flooding damage, erosion and unstable soils. Prevention of interference with the natural hazards and protection of the existing wetland will be achieved through Planning Controls, including zoning, site plan control and conditions of draft approval.

3) Any new development proposed adjacent to areas designated as PSWs will be subject to the County Official Plan policies in section 5.06.5.2 – Adjacent Lands i.e. 120 metres from the boundary of any adjacent PSW or Locally Significant Wetland. Before any development applications (i.e. consent, plan of subdivision, rezoning or site plan) will be considered the applicant, in conjunction with the Raisin Region Conservation Authority, will be required to submit an Environmental Impact Study (EIS).

4) Prior to any application submission for residential development in Lot 16, Concession 1, EISs must be prepared to consider the natural resource value of the Bainsville Bay Marsh Wetland (as evaluated and mapped by the MNR) identifying appropriate locations for site alterations, buildings, septic systems, roads and related infrastructure. The impact studies shall specifically demonstrate that development in this area is designed in such a manner as to preserve the existing tree cover, particularly the white pine growth, conserve continued groundwater linkage to Lake St. Francis and identify specific development controls and construction techniques to mitigate wetland impacts. The policies for residential development in Lot 16, Concession 1, above will also apply to any development in the Employment District area of this lot.

SECTION 8

EBR COURT ACTIONS

SECTION 8: *EBR* COURT ACTIONS

April 1, 2007 to March 31, 2008
Status as of August 1, 2008

Parties to the Action and Type of Action

Plaintiffs: Karl Braeker, Victoria Braeker, Paul Braeker and Percy James
Defendants: Her Majesty the Queen in Right of Ontario, 999720 Ontario Limited, and Max Heinz Karge
Registry #: CQ8E0001
Date Statement of Claim Issued: July 27, 1998
Type of Action: Harm to a public resource action, section 84, *EBR*
Court Location: Superior Court of Justice, Grey County (West Region)

Description of Grounds for Claim:

The plaintiffs live next to property owned by the defendant Karge, located in Egremont Township in the County of Grey. The plaintiffs claim that the property is the site of an illegal waste dump and that substances emanating from the site are contaminating or will imminently contaminate the subsoil, groundwater, and surface water in the surrounding vicinity, including the plaintiffs' wellwater. They claim that the defendants are responsible for this contamination. The damages sought by the plaintiffs include: an injunction preventing the use of the property for any use other than rural uses; an environmental restoration plan to prevent, diminish or eliminate harm to a public resource caused by contaminants emanating from the waste dump and to restore the site to its prior condition; and damages in excess of one million dollars.

Status/Final Outcome:

Action pending.

Notice was approved by the court and placed on the Registry on December 23, 1999.

As of August 1, 2008, this matter is still going through various pre-trial procedures and has not been listed for trial at this point.

Parties to the Action and Type of Action

Plaintiff: Wilfred Robert Pearson (and others)
Defendants: Inco Limited, The Corporation of the City of Port Colborne, The Regional Municipality of Niagara, The District School Board of Niagara, and The Niagara Catholic District School Board
Registry #: CQ01E0001
Date Statement of Claim Issued: March 26, 2001
Type of Action: Public nuisance action, section 103, *EBR*
Court Location: Superior Court of Justice, Welland

Description of Grounds for Claim:

The plaintiff in this class proceeding maintains that the defendant has and does emit and discharge hazardous contaminants into the natural environment, including the air, water and soil of Port Colborne. The contaminants include oxidic, sulphuric and soluble inorganic nickel compounds, copper, cobalt, chlorine, arsenic and lead. The plaintiff claims that the defendant is liable for the activities at the refinery and the ongoing release of contaminants into the environment and onto the lands of the class members, based on the following causes of action: negligence; nuisance; public nuisance under section 103 of the *EBR*; trespass; discharging contaminants with adverse effects under ssection 14 of the *EPA*; and the doctrine of strict liability in *Rylands v. Fletcher*. The plaintiff claims punitive and exemplary damages in the amount of $150 million, and compensatory damages in the amount of $600 million.

Status/Final Outcome:

The certification motion was heard in June 2002. In a judgment dated July 15, 2002, the Ontario Superior Court of Justice dismissed the plaintiff's certification motion on the following grounds: the plaintiff failed to disclose a reasonable cause of action against the Region, the City or the Crown; there was no identifiable class; and a class proceeding is not the preferable procedure for resolving the issues found to be common among the class members. In September 2002, the Superior Court of Justice held the plaintiff liable for costs on the certification motion. The plaintiff and class members appealed this decision to the Divisional Court. In February 2004, the Divisional Court upheld the lower court's decision that it was not appropriate to certify this as a class action. In March 2004, MOE and the other parties agreed to an undisclosed settlement with the plaintiff, leaving Inco as the only defendant in the lawsuit. On May 30, 2005, the Ontario Court of Appeal (OCA) heard Pearson's appeal of the certification issue. The ECO intervened in this appeal on the issue of liability for costs.

In November 2005, the OCA overturned the two lower court rulings that refused to certify a class of property owners. In doing so, the OCA has determined that when environmental class litigants properly frame their claims, they can be certified, notwithstanding the earlier failures that have occurred, including the 2001 decision of the Supreme Court of Canada in *Hollick v. Toronto* (Municipality). On the issue as to whether the plaintiffs could form an identifiable class, the OCA noted that the plaintiff had dropped the health claims related to nickel exposure. Thus, the lawsuit was based solely on reduced property values that resulted from the government announcement of the nickel contamination. Both lower courts had been concerned with the broad nature of the original class definition. Since the common issues before the OCA were narrower than in the courts below and the available evidence supported the allegation of reduced property values for everyone in the proposed geographical area, the OCA accepted that there was an identifiable class and supported certification.

The other main issue in the appeal was whether a class action was the "preferable procedure" for addressing the various claims. Under the *Class Proceedings Act*, the courts are required to consider whether on balance, a class action is the most fair, efficient and manageable method of advancing the class members' claims and whether the class action would be preferable to other reasonably available means of resolving the claims. The December 2004 OCA in *Cloud v. The Attorney General of Canada* was cited as an indication that the OCA is now taking a more liberal approach to certification of class proceedings than it had taken in the past. The Pearson decision should provide new hope to environmental class litigants who had seen a number of high profile class actions defeated at the certification stage. On June 29, 2006, the SCC rejected Inco's application for leave to appeal, allowing the Pearson case to proceed to trial.

The parties are now preparing for trial, which is scheduled to begin in the fall of 2008. The ECO will report on the progress of this case in a future report.

SECTION 9

STATUS OF ECO AND PUBLIC REQUESTS TO PRESCRIBE NEW OR EXISTING MINISTRIES FOR LAWS, REGULATIONS OR PROCESSES UNDER THE *EBR*

SECTION 9: STATUS OF ECO AND PUBLIC REQUESTS TO PRESCRIBE NEW OR EXISTING MINISTRIES FOR LAWS, REGULATIONS OR PROCESSES UNDER THE *EBR*

One of the challenges facing the Environmental Commissioner of Ontario (ECO) and the Ontario government is keeping the *EBR* in sync with new laws and government initiatives. The ECO strives to ensure that the *EBR* remains up-to-date and relevant to Ontario residents who want to participate in environmental decision-making. The Commissioner and his staff constantly track legal and policy developments at the prescribed Ministries and in the Ontario government as a whole, and encourage Ministries to update the *EBR* regulations to include new laws and prescribe new government initiatives that are environmentally significant.

There are four main factors that make it necessary to update the *EBR* regulations to include new Ministries, programs and laws. First, the Ontario government constantly enacts and implements new environmental legislation. Indeed, a large number of innovative environmentally significant laws and regulations have been passed in the past 10 years, as regular readers of our Annual Reports will know.

Second, the Ontario government may decide to re-organize one ministry or redistribute portfolios between several ministries. For example, the Ministry of Public Infrastructure Renewal (PIR) was established by the Ontario government in November 2003 with a mandate to support upgrades to roads, transit systems and other public infrastructure and promote sound urban and rural development. In June 2008, the Ontario government announced that PIR would be merged with the Ministry of Energy to create the Ministry of Energy and Infrastructure. (See below for further discussion on the issue of prescribing PIR.)

Third, members of the public may file an application for review requesting that a certain Ministry that is not currently prescribed, such as Education or Finance, be prescribed under the *EBR*, or that O. Reg. 73/94 under the *EBR* be amended to require a currently prescribed ministry to accept applications for review or investigation. The ECO has received nine applications of this nature since February 1995. In addition, the ECO sometimes recommends that a ministry, agency or process be prescribed under the *EBR*.

A fourth scenario arises when the Ontario government decides to revamp a program, and in doing so, alters the rights of Ontario residents under the *EBR*. For example, when the *EBR* was proclaimed in 1994 the federal *Fisheries Act (FA)* was prescribed for investigations of alleged contraventions of sub-sections 35(2) and 36(3). As described in the ECO's 2001-2002 Annual Report, the Ministries of Natural Resources (MNR) and Environment gradually have withdrawn from enforcement of these *Fisheries Act* provisions. (For further discussion, see the review of the *FA* Compliance Protocol in section 4.24 of this Supplement.) In April 2008, MOE finally posted a proposal notice indicating that the *FA* would be removed as an Act subject to investigations under the *EBR*, more than four years after the ECO agreed to cease forwarding applications alleging contraventions of the *FA* to MNR and MOE. Other laws and related programs that have been affected by similar changes made in the late 1990s and no longer subject to the full suite of *EBR* rights include the *Planning Act* and the *Conservation Authorities Act*, administered by MMAH and MNR respectively.

When the Ontario government passes and then proclaims a new environmental law, the ECO reviews the law to determine whether it would be logical for the Ontario government to prescribe it for the purposes of the *EBR* and to ensure that Ontario residents are extended rights to participate in environmentally significant decision-making on proposed regulations and instruments issued under the new law. For example, certain new laws have sweeping implications for environmental planning, and there is strong public interest in participation in their implementation. Before the public can begin to participate in decisions to issue new regulations or instruments or request investigations and reviews, new stand-alone laws such as the *Ontario Heritage Act* have to be added to the lists of laws prescribed for the *EBR* as set out in O. Reg. 73/94, the General Regulation under the *EBR*.

In some cases, a new law such as the *Brownfields Statute Law Amendment Act, 2001 (BSLLAA)* amended existing environmental laws that are already prescribed. In these cases, the ECO may request that a ministry determine if any new environmentally significant instruments are created under the amended law and associated regulations, and if the ministry should consider amending O. Reg. 681/94, the Instrument Classification Regulation made under the *EBR*.

If the new law is considered to be environmentally significant, the ECO then contacts the Deputy Minister of the ministry responsible and requests that the Act or certain parts of it be prescribed under the *EBR*. If the ministry agrees, it must then seek appropriate internal and central agency approvals and work with MOE, which is responsible for administering the *EBR* and its regulations, to ensure that appropriate amendments are made and that the proposed changes are posted on the Registry for public comment. Usually this process takes between one and three years. In some cases, the process can take much longer. For example, *Oak Ridges Moraine Conservation Act, 2001* was not prescribed until June 2007 even though the ECO raised this issue with MMAH in late 2001 and the ministry posted proposals for regulations related to prescribing the *ORMCA* under the *EBR* in 2003.

To illustrate the current status of various recent Acts and regulations, the ECO has updated its summary in Table 1. This table is an indication of the scope of the challenges faced, and is not intended to provide a comprehensive review. As indicated in Table 1, there have been serious delays in making certain laws subject to the *EBR*. The ECO is concerned about these lengthy delays because this means that the public is deprived of rights to participate in environmentally significant decisions, file leave to appeal applications and request *EBR* investigations and reviews. Moreover, the ECO is not legally empowered to subject ministry decision-making under these non-prescribed Acts to the same degree of scrutiny as would normally occur for decisions made under prescribed Acts.

In the 2007/2008 reporting period the ECO observed some formal progress in expanding *EBR* coverage. In June 2007, MMAH and MOE completed work on prescribing the *ORMCA* and the *Greenbelt Act* as outlined in Table 1 below.

More progress is expected in the 2008/2009 reporting period. In early 2008, the Minister of the Environment advised the Commissioner that a proposal for regulatory amendments to O. Reg. 73/94 would be posted on the Registry in the spring of 2008. On April 18, 2008, MOE posted a proposal on the Registry indicating that the ministry intends to move forward on a package of amendments to O. Reg. 73/94 and, in June 2008, the regulatory changes were filed. The June 2008 regulatory amendments address many important and necessary changes to O. Reg. 73/94; however, many needed updates and changes described in the tables below will remain unaddressed by the proposed regulation.

For example, the ECO's 2006-2007 Annual Report recommended that MOE prescribe the *Clean Water Act (CWA)* under the *EBR* as quickly as possible to ensure that all new regulations under the *CWA* will be subject to the notice and comment requirements under the *EBR*, and to provide the public with the rights to apply for reviews, investigations and leave to appeal in relation to the *CWA*. The ECO also urged MOE to include source protection plans (SPPs) issued under the *CWA* as prescribed instruments under the *EBR* so that they will be posted on the Registry for notice and comment and could be subject to appeals.

In its April 2008 proposal, MOE suggested that it will prescribe the *CWA* for the purposes of posting regulatory proposals and applications for review. However, to date, MOE has not indicated it intends to prescribe SPPs as instruments by amending O. Reg. 681/94. This is unfortunate as it means less transparency and accountability for decision-making under the *CWA*. The ECO urges MOE to reconsider prescribing SPPs given the growing public concern about source water protection.

Table 2 contains an update on the status of applications for review made by the public to make certain Ministries subject to the *EBR* or to expand the number of *EBR* processes that apply to a prescribed ministry. In our 2006-2007 Annual Report we reported that the Ministries appeared to be more receptive to requests for review submitted by members of the public under the *EBR* to prescribe Acts and Ministries. The ECO applauded this new receptivity. We note that MOE's April 2008 proposal notice (referred to above) indicates that MOE intends to move forward on prescribing the Ministry of

Transportation (MTO) for reviews under the *EBR*. When completed, this regulatory change will implement a request made by two Ontario residents in an *EBR* application for review filed in 2003. While this is a positive development, the delay in implementing this change is disappointing, especially in view of the key role that MTO plays in formulating policies related to public transportation and sound urban development. The public has been unable to file applications for review related to the work of MTO during this interim period.

In early 2004, the ECO wrote to PIR requesting that the ministry be prescribed for SEV consideration, Registry notice and comment, regulation proposal notices and for applications for review under the *EBR* and that the *Places to Grow Act* be prescribed for regulation proposal notices and for applications for review under the *EBR*.

The ECO met PIR staff in early 2006 and were advised that work was ongoing. In early 2008, the Minister of the Environment advised the Commissioner that the April 2008 package of O. Reg. 73/94 amendments would make PIR subject to the *EBR*.

However, as noted below, MOE's notice describing the proposed regulation did not include any references to PIR and the final regulation, passed in June 2008, did not prescribe PIR. The lack of progress in prescribing PIR under the *EBR* is a shocking abuse of process and a significant blow to transparency and accountability in environmental decision-making because PIR continues to work on growth management plans for some parts of southern and northern Ontario, with clear environmental significance.

Despite the lack of progress in the 2007/2008 reporting period, there are some positive signs that this issue may be resolved in 2008/2009. On June 20, 2008, the Premier announced that the former Ministries of Energy and Public Infrastructure Renewal will be merged to create the Ministry of Energy and Infrastructure. The new ministry is currently reviewing how the *EBR* should apply to its work.

Table 1: Status of ECO Requests to Prescribe New Laws, Regulations and Instruments under the *EBR* as of August 2008

Act, Regulation or Instrument **(Ministry)**	**ECO request to prescribe**	**Status as of August 2008 and ECO Comment**
Building Code Act (MMAH)	In October 2006, the ECO's 2005-2006 Annual Report recommended that MMAH and MOE fully prescribe the *Building Code Act* under the *EBR* for regulation-making and instrument proposal notices and applications for reviews.	In March 2007, MMAH and MOE advised the ECO that MMAH has no plan to implement the ECO recommendation on prescribing the *Building Code Act*. This is an unfortunate decision and it means that transparency and accountability for MMAH policy- and law-making on green building materials and energy technologies will be reduced. The ECO urges MMAH to reconsider its approach given the growing public concern about issues such as climate change. On April 18, 2008 MOE posted a proposal on the Registry indicating that the ministry intends to move forward on a package of amendments to O. Reg. 73/94 but

		prescribing the *BCA* was not included in the proposal. (Hereinafter, e.g.: Prescribing the *BCA* was not included in the April 2008 Proposal).
Clean Water Act, 2006 (MOE)	The ECO's 2006-2007 Annual Report recommended that MOE prescribe the *CWA* under the *EBR* as quickly as possible to ensure that all new regulations under the *CWA* will be subject to the notice and comment requirements under the *EBR*, and to provide the public with the rights to apply for reviews, investigations and leave to appeal in relation to the *CWA*. The ECO also urged MOE to include Source Protection Plans (SPPs) issued under the *CWA* as prescribed instruments under the *EBR* so that they will be posted on the Registry for notice and comment and could be subject to appeals.	In its April 2008 proposal, MOE suggested that it will prescribe the *CWA* for the purposes of posting regulatory proposals and applications for review. However, to date, MOE has not indicated it intends to prescribe SPPs as instruments by amending O. Reg. 681/94. This is unfortunate as it means less transparency and accountability for decision-making under the *CWA*. The ECO urges MOE to reconsider prescribing SPPs given the growing public concern about source water protection. The *CWA* was prescribed by O. Reg. 215/08 passed in June 2008.
Endangered Species Act, 2007 (MNR)	The ECO's 2006-2007 Annual Report recommended that MNR and MOE fully prescribe the *Endangered Species Act, 2007* under the *EBR* for regulation-making and instrument proposal notices and applications for reviews.	On April 18, 2008 MOE posted a proposal on the Registry indicating that it intends to move forward on this proposal in the coming months. (Hereinafter, e.g.: Prescribing the *ESA* was included in the April 2008 Proposal) The proposal states that the *ESA, 2007* will be prescribed under sections 3, 6, 9 and 12 of O. Reg. 73/94, with an exception from sections 3 and 6 of the regulation for non-discretionary regulations made under section 7 of the *ESA*. This would require most regulations made under the *ESA, 2007* to be posted on the Registry for a minimum of 30 days. *ESA* regulations also will be subject to the application for review provisions under the *EBR* with the exception of non-discretionary regulations made under section 7 of the Act. These amendments would also make the *ESA, 2007* prescribed for the application for investigation and whistle blower provisions under the *EBR*. The *ESA, 2007* was prescribed for

		most purposes of the *EBR* by O. Reg. 215/08 passed in June 2008.
Energy Conservation Leadership Act, 2006 (ENG)	In September 2007, two applicants requested that the Ministry of Energy (ENG) prescribe the *Energy Conservation Leadership Act, 2006* for applications for review and proposals for new regulations. The applicants argue that this would mean that Ontario residents could file applications for review with the Minister of Energy and the Minister's responses would be formally monitored and reported on by the ECO. Moreover, the Commissioner could then comment on the importance of adopting regulations under the Act, including one that would prohibit restrictive covenants that ban clotheslines.	In January 2008, ENG posted an information notice stating that it intended to develop a regulation that would prohibit restrictive covenants that ban clotheslines. ENG went on to note that the *ECLA* is not prescribed under the *EBR* and invited comments on the proposal to prescribe the Act. Prescribing the *ECLA* was included in the April 2008 proposal. The *ECLA* was prescribed for the *EBR* by O. Reg. 215/08 passed in June 2008.
Greenbelt Act, 2005 (MMAH)	The ECO wrote to MMAH in April 2005 requesting that it prescribe the *Greenbelt Act* under the *EBR* for regulation and instrument proposal notices and applications for reviews.	In April 2005 MMAH informed the ECO it will begin to work on the amendments required to prescribe the *Greenbelt Act* under the *EBR*. In March 2007 MMAH reported that it is committed to prescribing the *Greenbelt Act, 2005* under the *EBR*, and "is taking the necessary steps to achieve this." The *Greenbelt Act* finally was prescribed for regulation proposal notices (but not for instruments) and applications for review by O. Reg. 217/07 passed in June 2007.
Health Protection and Promotion Act (MOHLTC and MOE)	The ECO's 2004-2005 Annual Report recommended that MOHLTC and MOE prescribe the *Health Protection and Promotion Act* for regulation-making and related applications for reviews. The ECO was concerned that environmentally significant proposed *HPPA* regulations related to small drinking water systems would not otherwise be posted since MOE was proposing to transfer authority over small drinking water systems to MOHLTC, as recommended by the Walkerton Inquiry in 2002.	The *HPPA* was prescribed for the *EBR* by O. Reg. 215/08 passed in June 2008. The amendments require MOHLTC to post environmentally significant proposed *HPPA* regulations related to small drinking water systems on the Registry, and make regulations made under those provisions subject to the application for review and whistle blower provisions under the *EBR*.

Kawartha Highlands Signature Site Parks Act, 2003 (MNR)	The ECO wrote to MNR in April 2005 requesting that it prescribe the *KHSSPA* under the *EBR* for review and investigation applications.	MNR advised the ECO by letter dated May 25, 2005 that MNR agrees that the *KHSSPA* should be prescribed under the *EBR*. MNR will work with MOE to do so once the *KHSSPA* is proclaimed in full and the parks boundaries are regulated. The *KHSSPA* came into effect on June 15, 2007. In our 2006-2007 Annual Report, the ECO urged MNR and MOE to immediately begin work on prescribing the *KHSSPA* under the *EBR*. The *KHSSPA* was prescribed for the *EBR* by O. Reg. 215/08 passed in June 2008.
Lakes and Rivers Improvement Act (LRIA), Water Management Plans (WMPs) issued under section 23.1 (MNR)	The *Reliable Energy and Consumer Protection Act* (AB02E6001) received Royal Assent in June 2002 and created section 23.1 of the *LRIA*, which replaced section 23 of the Act. In our 2002-2003 Annual Report, the ECO encouraged MNR to amend O. Reg. 681/94 to include WMPs issued under section 23.1 as prescribed instruments.	Section 23 of the *LRIA* remains as a prescribed instrument under the *EBR* but it appears to be of little or no force and effect. MNR posted information notices for four WMPs during the reporting period. These notices should have been subject to public notice and comment under the *EBR*. In March 2006, MNR advised the ECO that it is not proceeding with the classification of WMPs as instruments under the *EBR* because its Water Management Planning Guidelines for Waterpower "establishes a comprehensive approach to public engagement." MNR also noted that the majority of WMPs are complete or close to completion. The ECO finds this decision very disappointing.
Nutrient Management Act (OMAFRA and MOE) Note: In late 2003, MOE assumed jurisdiction for enforcement of several aspects of the *NMA*.	The ECO wrote to OMAFRA in late 2001 and again in 2002 and 2003 requesting that it prescribe the *NMA* under the *EBR* for regulation and instrument proposal notices and applications for review and investigation. Unless Nutrient Management Strategies (NMSs) and Nutrient Management Plans (NMPs) are designated as instruments, the public and municipalities will not be notified on the Registry of local nutrient	In January 2006, the ECO was pleased to learn that the *NMA* and its regulations were prescribed for notice and comment and for applications for review. However, the *NMA* and its regulations were not designated for applications for investigation and NMSs and NMPs were not designated as instruments. In March 2008, the ECO asked OMAFRA for an update on its work prescribing the *NMA* for applications

	management activities, and residents will be unable to request an investigation under the *EBR* into possible non-compliance and request reviews of specific NMSs and NMPs.	for investigation and designating NMSs and NMPs for large livestock operations as instruments. In response, OMAFRA claimed that the purpose of *EBR* investigations and prescribing of instruments is to achieve transparency, and that this already is achieved by clearly articulating the requirements for NMPs and NMSs in the *NMA* Regulation. In addition, OMAFRA noted that there is sensitivity in the farm community to posting NMPS and NMSs on the Registry because they contain proprietary information. Public access to this information could cause business problems for these farmers. The ECO finds OMAFRA's approach very disappointing.
Oak Ridges Moraine Conservation Act, 2001 (MMAH)	The ECO wrote to MMAH in December 2001 requesting that it prescribe the *ORMCA* under the *EBR* for regulations and instrument proposal notices and applications for reviews. In early 2003 MMAH staff briefed ECO staff on its plan to use information notices for official plan amendments (OPAs) related to *ORMCA* implementation rather than regular instruments. In March 2006 MMAH informed the ECO that it was working on the amendments to O. Reg. 73/94 that are required to prescribe the *ORMCA* under the *EBR*.	In March 2007 MMAH reported that it is committed to prescribing the *ORMCA, 2001* under the *EBR*, and "is taking the necessary steps to achieve this." The *ORMCA* was prescribed for instrument proposal notices by O. Reg. 216/07 passed in June 2007. The ECO commends MMAH and MOE for making this overdue regulatory change.
Ontario Heritage Act (OHA) (MCL)	The *Ontario Heritage Act* (*OHA*) is the legislative framework for heritage conservation in Ontario. In 2005, the *OHA* was amended to formally recognizes the natural environment conservation function of the Ontario Heritage Trust (formerly the Ontario Heritage Foundation). For further detail on the amendments to the *OHA* and the OHT, see the ECO 2005-2006 Annual Report at pages 76-79. In June 2005, the ECO wrote to MCL requesting that it prescribe the	In July 2005 MCL wrote to the ECO and stated that it was aware of the ECO's interest in seeing the Act prescribed as soon as possible. MCL went on to note that it would be responding to the ECO's request once it had reviewed the matter thoroughly. However, no timeline was provided. Prescribing the *OHA* was not included in the MOE's April 2008 proposal. In July 2008 the Deputy Minister of

	OHA for regulation proposal notices and for applications for review under the *EBR*. ECO and MCL staff also discussed this issue at an August 2007 meeting about prescribing the OHT.	MCL wrote to the ECO and explained her ministry had completed its review and will be working with MOE to prescribe the *OHA* for the purposes of posting proposals for regulations. The ECO commends MCL for completing its review and agreeing to make this regulatory change.
Safe Drinking Water Act, 2002 (MOE)	In January 2003, the ECO wrote to MOE requesting that it prescribe the *SDWA* for regulation proposal notices and for applications for review under the *EBR*. ECO staff also discussed this issue at numerous meetings between the ECO and the Environmental Bill of Rights Office of the MOE in 2003 and 2004. MOE contends that the *SDWA* should not be prescribed for *EBR* investigations because the *SDWA* has separate investigation provisions, as recommended by the Walkerton Inquiry. In 2005 MOE finalized a separate regulation on *SDWA* investigations that it first proposed in June 2003.	MOE prescribed the *SDWA* for regulations and reviews in the summer of 2003. The ECO agrees with MOE that *SDWA* should not be prescribed for *EBR* investigations. MOE also insists that it is not appropriate to prescribe *SDWA* instruments under the *EBR* because most *SDWA* approvals are exempted under the Municipal Class Environment Assessment on Roads and Water and Sewer Projects. This means that Ontario residents cannot file *EBR* applications for review related to *SDWA* instruments. This is an unfortunate result, and the ECO urges MOE to reconsider this limitation, which seems contrary to the spirit of the Walkerton Inquiry report. In April 2008, the ECO wrote to MOE requesting that licences issued under the *SDWA* be prescribed as instruments under the *EBR*. In late May 2008, MOE responded by stating it had commenced a review under section 20 of the *EBR* and hoped to complete its review by the fall of 2008.
Sustainable Water and Sewage System Act, 2002 (MOE)	In January 2003, the ECO wrote to MOE requesting that it prescribe the *SWSSA* for regulation proposal notices and for applications for review and investigation under the *EBR*.	MOE prescribed the *SWSSA* for regulations and reviews in the summer of 2003. (see O. Reg. 104/03) However, this Act has yet to be proclaimed because MOE has not yet developed any regulations under it. Prescribing the *SWSSA* was not included in the MOE's April 2008 proposal.
Waste Diversion Act, 2002 (MOE)	In July 2002, the ECO wrote to MOE requesting that it prescribe the *WDA* for regulation proposal notices and for applications for review and investigation under the *EBR*.	In 2003, MOE amended O. Reg. 73/94 to require the ministry to post notices for proposed *WDA* regulations but Ontario residents are not permitted to file applications for

	In May 2003 MOE staff briefed ECO staff on its position on prescribing the *WDA* and indicated that MOE did not believe that the *WDA* should be prescribed for investigations because the contravention section of the *WDA* is intended to support the collection of funds to support waste diversion activities by Waste Diversion Ontario.	review related to the *WDA* (see O. Reg. 104/03). In 2004, Ontario residents filed two applications for review related to prescribing materials for recycling under the *WDA*, and both reviews were rejected. The ECO believes that MOE should reconsider whether it would be worthwhile prescribing the *WDA* for *EBR* reviews. Prescribing the *WDA* for reviews was not included in the April 2008 proposal. In 2007, the MOE announced that the *WDA* would be reviewed in 2008.

Table 2: Status of Public and ECO Requests to Prescribe New Ministries, Agencies and *EBR* Processes as of August 2008

Ministry or Process	**ECO or Ontario resident request to prescribe**	**Status as of August 2008 and ECO Comment**
Making the Ministry of Transportation Subject to the Application for Review Process (MTO and MOE)	In June 2003, two applicants requested that the Ministry of Transportation (MTO) be made subject to Part IV of the *EBR* which, if granted, would permit residents of Ontario to request reviews of MTO's policies and prescribed Acts, regulations, and instruments (permits, licences etc.) and to ask MTO to review the need for new Acts, regulations and policies. To date, MTO's participation has been limited to creating a SEV and posting proposals for new environmentally significant Acts and policies on the Registry for public comment. The applicants felt that the *EBR*'s application for review procedure should apply to MTO and its activities because of the environmental impacts of highway development and use, and the need for MTO to consider and/or promote modes of travel other than highway-based, including alternatives such as rail.	In September 2005, the Ministry of the Environment recommended prescribing the Ministry of Transportation for the purposes of applications for review under the *EBR*. For the full comment on this application for review, please see the 2005-2006 ECO Annual Report Supplement. In March 2007, MTO and MOE advised the ECO that a package of regulatory changes containing amendments to O. Reg. 73/94 which will make MTO subject to *EBR* reviews would be posted on the Registry in the spring of 2007. MTO was prescribed for reviews by O. Reg. 215/08 passed in June 2008.

Making the Ministry of Aboriginal Affairs Subject to the EBR (MAA and MOE)	The Ministry of Aboriginal Affairs (MAA) was established by the Ontaric government in November 2007 with a mandate to protect the rights of Aboriginal peoples, and promote the health and economic well being of Aboriginal Ontarians. In November 2007, the ECO wrote to MAA requesting that the ministry be prescribed for SEV consideration, Registry notice and comment, regulation proposal notices and for applications for review under the *EBR*.	In early 2008, the ECO requested an update from MOE. In response, the MOE explained that MOE and MAA have discussed the potential MAA activities that might be subject to the *EBR* and the Registry. MOE also offered its ongoing assistance as MAA reviews its options. Prescribing MAA was not included in the April 2008 proposal. The ECO urges MOE and MAA to ensure that the ministry is prescribed under the *EBR* before the end of 2008.
Making the Ministry of Education Subject to the EBR (EDU and MOE)	In May 2004, two applicants requested that the MOE review O. Reg. 73/94, the General Regulation under the *EBR*, to determine whether the Ministry of Education (EDU) should be added as a prescribed ministry under the *EBR*. In July 2004 MOE advised the ECO that it was reviewing the request and would require six months to complete its review. A similar request was made to MOE in late 1999 and it was reviewed in the ECO 2000-2001 Annual Report.	In September 2005 the Ministry of the Environment completed its review and recommended prescribing EDU for the purposes of consideration of a Statement of Environmental Values that the ministry would create under the *EBR*. For the full ECO comment on the MOE's handling of this review, please see pages 123-7 of the ECO 2005-2006 Annual Report. In November 2005 MOE posted a proposal notice for a regulation to amend O. Reg. 73/94. In June 2007, Ontario's Curriculum Council released its proposal describing how environmental education will be taught in elementary and secondary schools. Prescribing EDU was not included in the April 2008 proposal.
Making the Ministry of Health Promotion Subject to the EBR (MHP and MOE)	The Ministry of Health Promotion (MHP) was established by the Ontario government in July 2005 with a mandate to promote the health and well being of Ontarians. In June 2006, the ECO wrote to MHP requesting that the ministry be prescribed for SEV consideration, Registry notice and comment, regulation proposal notices and for applications for review under the *EBR*. MHP never officially responded with a letter to the ECO.	The ECO spoke with staff at MHP in the summer of 2006. As of May 2007 work on these matters was ongoing at MHP. MOE advised the ECO in March 2007 that MHP was reviewing options for going forward. In our 2006-2007 Annual Report, the ECO urged MOE and MHP to ensure that the ministry is prescribed under the *EBR* before the end of 2007. In early 2008, the ECO requested an update from MOE. In response, the MOE explained that MOE and MHP

		have discussed the potential MHP activities that might be subject to the *EBR* and the Registry. MOE also offered its ongoing assistance as MHP reviews its options. Prescribing MHP was not included in the April 2008 proposal.
Making the Ministry of Public Infrastructure Renewal Subject to the EBR (PIR and MOE)	The Ministry of Public Infrastructure Renewal (PIR) was established by the Ontario government in November 2003 with a mandate to support upgrades to roads, transit systems and other public infrastructure and promote sound urban and rural development. To support this vision, in the spring of 2005 the Ontario government enacted a major piece of PIR legislation titled the *Places to Grow Act* (*PGA*). In early 2004, the ECO wrote to PIR requesting that the ministry be prescribed for SEV consideration, Registry notice and comment, regulation proposal notices and for applications for review under the *EBR* and that the *Places to Grow Act* be prescribed for regulation proposal notices and for applications for review under the *EBR*. Although the *PGA* requires that notices of a proposed growth plan be posted on the Registry PIR is currently unable to post these notices as regular policy proposals and the ECO is not mandated to fully review them. Since July 2004 PIR has posted six information notices on the Registry.	The ECO met PIR staff in early 2006. In early 2008, MOE advised the ECO that a package containing amendments to O. Reg. 73/94 which will make PIR subject to the *EBR* would be posted on the Registry in the spring of 2008. In early April 2008, PIR posted two key policies as information notices: Proposed Size and Location of Urban Growth Centres in the Greater Golden Horseshoe; and Built Boundary for the Growth Plan for the Greater Golden Horseshoe, 2006. Prescribing PIR was not included in the April 2008 proposal. The lack of progress in prescribing PIR under the *EBR* is a significant disappointment because PIR continues to work on growth management plans for most areas of southern Ontario, with clear environmental significance. On June 20, 2008, the Premier announced that the former ministries of Energy and Public Infrastructure Renewal will be merged into the Ministry of Energy and Infrastructure. The new ministry is currently reviewing how the *EBR* should apply to the new ministry.
Making the Ontario Heritage Trust Subject to the EBR (MNR, MCL and MOE)	The *Ontario Heritage Act* (*OHA*) is the legislative framework for heritage conservation in Ontario. In 2005, the *OHA* was amended to formally recognize the natural environment conservation function of the Ontario Heritage Trust (formerly the Ontario Heritage Foundation). The Ontario Heritage Trust (OHT), an agency of the Ministry of Culture (MCL), is the	In April 2006, MCL responded and suggested that staff of the OHT and MNR meet with the ECO to provide an update on OHT's work and to discuss what actions should be taken. MCL did not expressly commit to making the OHT subject to the *EBR*. In October 2006, the ECO's 2005-2006 Annual Report recommended that the OHT become an *EBR*-

	province's lead heritage agency and dedicated to identifying, preserving, and promoting Ontario's heritage for the benefit of present and future generations. One of its programs focuses on natural heritage and the OHT holds in trust a portfolio of more than 130 natural heritage properties, including over 90 properties that are part of the Bruce Trail. Protected land includes the habitats of endangered species, rare Carolinian forests, wetlands, sensitive features of the Oak Ridges Moraine, nature reserves on the Canadian Shield and properties on the Niagara Escarpment. In March 2006, ECO wrote to MCL requesting that the OHT be prescribed for environmentally significant decisions. This would include SEV consideration and Registry notice and comment for proposal notices for Acts and policies. Such an approach would ensure that future changes to the Natural Spaces Land Acquisition and Stewardship Program (NSLASP) now administered by the OHT would be posted on the Registry for comment. Changes made to the NSLASP in late 2005 were not posted as a regular proposal notice on the Registry. The ECO also requested that MCL post a regular Registry notice about the NSLASP on behalf of the OHT.	prescribed agency (page 79). In August 2007, ECO and MCL staff met and MCL indicated that it was not planning to implement the ECO recommendation because OHT is not a policy-making agency. All policies and programs related to the work of OHT are developed by MCL and MNR; the OHT merely implements those programs. MCL further noted that MNR would ensure that future changes to the NSLASP would be posted on the Registry by MNR. MCL also stated that it continues to study whether it will prescribe the *OHA* for the purposes of posting *OHA* regulations and instruments issued by the Minister and her delegated staff on the Registry. Prescribing the OHT was not included in the April 2008 Proposal. The ECO is very disappointed by MCL's approach to prescribing the OHT and feels that the current funding, policy-making and reporting relations and functions are confused and lack transparency because they are fragmented between MNR, MCL and the OHT. The ECO notes that the Minister of Culture retains important decision-making powers and functions related to the work of OHT, including decisions on the funding of the OHT. In July 2008, MCL reconfirmed that it will not be proposing to prescribe the OHT under the *EBR*. MCL continues to believe that, as Ministries are responsible for policy matters within the scope of the *EBR* and as MCL is prescribed, there is no need to prescribe the OHT under the *EBR*. MCL's and MOE's view is that agencies, boards and commissions are not included under the *EBR* and it is unprecedented to prescribe them. MCL will continue to emphasize with OHT the importance of appropriate and timely consultation/information-

		sharing with stakeholders and the public on OHT activities. For further detail on the amendments to the *OHA* and the OHT, see the ECO 2005-2006 Annual Report at pages 76-79.

SECTION 10

KEY RECOMMENDATIONS OF MINISTER'S REVIEW PANEL ON ENVIRONMENTAL ASSESSMENT (March 2005) AND IMPLEMENTATION AS OF APRIL 2008

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(For context, see Part 2 of the ECO 2007-2008 Annual Report: Environmental Assessment: A Vision Lost)

Recommendation Number and Category	Issue	Recommendation	Implementation as of April 2008
Recommendation 1: ***General Need for Principles, Policies and Procedures***	**Issue:** Need for EA to better address green projects in the waste, energy and transportation sectors.	The *Environmental Assessment Act* (*EAA*) should deliver major improvements across three sectors – waste, energy, transportation – by immediate attention to three topics set out in detail below: (1) general EA principles within MOE policy guidelines on how to interpret and apply the purpose of the Act to specific undertakings; (2) provincial policies for each sector on what factors contribute to "green" undertakings and thereby merit priority compared to other undertakings in the sector; and (3) prescriptive sector-specific procedures which correlate EA requirements with the degree of societal benefits and environmental risks associated with an undertaking, page 28.	See below.
Recommendation 2: ***EA Act Principles***	**Issue:** Need for guidance on how to interpret and apply the purpose of the *EAA*.	In order to ensure that all EA participants – proponents, the public and decision-makers – have a common framework to assess specific undertakings and assign preferences among alternatives, it is essential that more attention be	"Environmental Assessment Principles" in section 3 of the Draft Codes of Practice for "Preparing and Reviewing Environmental Assessments" and "Preparing, Reviewing and Using Class

		devoted to the purpose of the *EAA*. The purpose seeks the "betterment of the people" of Ontario and requires "the protection, conservation and wise management in Ontario of the environment". Based on this broad purpose, a set of general EA principles should be articulated in *EAA* policy guidelines for specific application to all decisions made under the *EAA*, page 29.	Environmental Assessments" in Ontario are as follows: ▪ Timeliness ▪ Clarity and Consistency ▪ Transparency ▪ Public Consultation ▪ Coordination of Approvals ▪ Risk Management ▪ Ecosystem Approach ▪ Best Available Information ▪ Appropriate Level Of Detail ▪ Prevent/Minimize Potential Harm to the Environment – Enhance Benefits to the Environment The Minister may take these principles into account in making decisions.
Recommendation 3: ***Sector-specific Policy***	**Issue**: Need for provincial policy which prioritizes "green" undertakings, and which addresses need and alternatives.	The Government of Ontario should develop sector-specific policies which must be followed under the *EAA*, just as the Provincial Policy Statement is issued and applied under the *Planning Act*. These sectoral policies should include a hierarchy of preferences based on degree of benefit and risk.	There was a sector-specific process for electricity projects at the time of the Minister's Panel, and a waste process has been introduced since. These are process-based rather than providing higher level policy or guidance. They provide for some categorization of projects based on potential environmental effects.
Recommendation 4: ***Establishment of Sector working groups***	**Issue**: Need to establish working groups to develop sectoral policy	The MOE should immediately establish small sectoral working groups for Energy, Transportation and Waste sectors. Members should be experienced in EA to expeditiously develop each sectoral policy, which can be forwarded to the Minister for review and	The Electricity Regulation and Guide have been under review for some time within EA Branch, but no document has been posted for consultation. The ministry referred to many comments directed at wind farms when it

		adoption under the *EAA*, page 39.	posted approval of some Codes of Practice in March 2007 (Registry number PA06E0009) - the posting said these were more relevant to the electricity process review, but this has not moved forward since then. In 2006 the Ontario Power Authority's Integrated Power System Plan was exempted from EA and is now before the Energy Board. The Municipal Class EA has now been revised to specify transit projects. Subsequently, a special regulation has been proposed, supported by a "Transit Priority Statement", to further scope the EA process for transit projects. There is a new Waste Management Regulation (101/07) and Guide to EA Requirements for Waste Management Projects. Changes include exemptions for landfills of 40-100,000 m^3 and energy-from-waste plants provided they follow a screening process. Again – primarily process rather than broad policy based.
Recommendation 5: ***EA Procedures***	**Issue:** Need for EA procedures which correlate assessment requirements to the degree of benefit and risk associated with an undertaking.	a) A procedural framework should be developed such that the nature and extent of EA documentation, notification, and planning depend on the environmental benefits and risks associated with a particular undertaking. Undertakings that pose	a) Class EAs and sectoral processes already do this to an extent, but there is no global set of criteria that are consistently applied to all projects as recommended by the Panel. b) The new waste

		benefits without corresponding risks should be given priority under the *EAA* in the sense that their process and approval standards are easier to meet than undertakings that create risks and produce few or no benefits. For each sector, existing Class EA and regulatory instruments should be adapted accordingly. b) Guided by the procedural charts in Chapter 3 and the principle that sector rules should be consistent across sectors, the Minister should ask the proposed working groups to recommend binding rules for EA triggers and processes for each sector. Thus, the procedural charts should be adopted as a future regulation, as amended by working group recommendations that treat similar projects within all sectors consistently. In particular, as suggested by the Waste Sector Table, the waste sector working group should consider the following issues: (i) designate certain waste management facilities (e.g. all landfills and incinerators accepting municipal and IC&I waste) as being subject to the *EAA*, regardless of proponency; (ii) exempt certain facility-related proposals from EA obligations (e.g. Category 1 projects); (iii) establish an appropriate EA process for small-scale or less environmentally significant projects within prescribed thresholds or categories; (iv) ensure that individual EAs are conducted for large-scale or environmentally significant	regulation and guide (discussed in #4 above) does this to a large extent. No provincial waste database has been released. c) The final TOR Code of Practice was issued in June 2007. It provides criteria for identifying alternatives, but does not prescribe which alternatives are to be considered. Need and alternatives can be scoped out if comparable work has been done on this prior to initiation of the TOR (which excludes them from challenge as part of the EA process once the TOR is approved).

		waste management undertakings; (v) provide prescriptive details on undertakings that require the highest level of assessment (e.g., TOR content or category 5 projects); and, (vi) compile and update a comprehensive provincial database on waste management. c) Pending the completion of the revised sectoral procedures, as an interim measure the MOE should immediately revise the draft TOR guideline to ensure consistency with this Report (especially in relation to "need" and "alternatives to"), and should post the revised TOR guideline on the *EBR* Registry for public review and comment prior to finalization, pages 42-43	
Recommendation 6: ***Provincial Advisory Body***	**Issue**: Need for impartial expert advice on a broad range of EA related matters.	The Minister should establish an independent advisory body to provide advice to the provincial government and solicit public input in relation to EA matters as may be warranted, page 66.	This would be similar to the former Environmental Assessment Advisory Committee - it has not been reinstated.
Recommendation 7: ***Funding for Advisory Body*** **	**Issue**: Financial support for advisory body.	Funding for the advisory body should be drawn, at least in part, from revenues generated from EA application fees (as described below in Recommendation 23), page 66.	No fee generation from EAs has been proposed or implemented.
Recommendation 8: ***Public participation***	**Issue**: Finalizing MOE consultation guideline.	The MOE should revise the draft consultation guideline to reflect the recommendations in this report, paying particular attention to the following issues: a) identification of "interested persons" within the meaning of the *EAA*; b) provision of timely and	The final version of the new Code of Practice on consultation was issued in June 2007. It deals with most of these topics, however participant funding is not provided for.

		effective public notices; c) ensuring public access to relevant documents and information; d) provision of adequate comment periods; e) effective methods and techniques for soliciting public input (including using municipal council proceedings where applicable); f) provision of adequate resources to members of the public to participate meaningfully in the EA process; and g) methods for accommodating public concerns and resolving issues in dispute. Following this revision the MOE should consult widely on their guideline before finalizing, page 69.	
Recommendation 9: ***Public participation***	**Issue**: Public participation rights and responsibilities under the *EAA*.	Once the consultation guideline has been finalized, the MOE should organize workshops and undertake other measures to ensure that proponents, participants and agencies understand public participation rights and responsibilities under the *EAA*, page 69.	No external workshops organized by MOE.
Recommendation 10: ***Public participation***	**Issue**: First Nations and Aboriginal community participation in EA planning and decision-making.	The Ontario government should develop, with First Nations and Aboriginal community input, appropriate protocols, procedures and collaborative agreements to facilitate meaningful participation by First Nations and Aboriginal communities in the EA planning and decision-making process, particularly in relation to: a) improving notice requirements; b) enhancing comment	Aboriginal peoples are addressed in the Consultation Code of Practice, but no specific provisions are made re: matters such as funding, presence on government review team.

		opportunities; c) resolving funding issues; and d) involving First Nations and Aboriginal communities as part of the government review team where appropriate under the *EAA*, pages 69-70.	
Recommendation 11: ***Public participation***	**Issue**: Review options for obtaining or confirming community acceptance (e.g., willing host) for undertakings.	The Minister should request that the advisory body review and report upon options for obtaining or confirming community acceptance (e.g., willing host) of undertakings proposed under individual EAs and Class EAs. At a minimum, the advisory body should be asked to consider whether there is a need for: a) inclusive, resourced local bodies to negotiate, monitor and revise agreements; b) explicit local benefits targeted towards closest neighbours to the site; c) comprehensive efforts to identify and engage diverse groups within the local community at the earliest planning stages; and d) an option to site elsewhere if negotiation efforts fail, page 70.	There is no advisory body, and community acceptance/willing host is not specifically dealt with in Codes of Practice.
Recommendation 12: ***Green project facilitator***	**Issue**: Need for high-level facilitation of "green projects" through EA process.	The Ontario government should create the office of a provincial process facilitator for green projects. This office will facilitate approval of green projects by: 1) expediting EA and other provincial requirements; and 2) resolving cross-jurisdictional or interministerial issues, page 78.	No green project facilitator role has been proposed or implemented.
Recommendation 13: ***Hearings, ADR, mediation***	**Issue:** Finalize MOE draft mediation guideline.	The MOE should revise the draft mediation guideline, and should specifically consider circumstances or criteria when it may be	The Mediation Code of Practice came into effect in June 2007. It provides criteria to determine whether ADR is

		appropriate for the Minister to refer matters to ADR and mediation under the *EAA*. One recommended issue to consider is the role of ADR when there is continuing public concern about a project. A one-day mandatory mediation could be considered for use at the end of contentious phases of an EA project before the proponent advances to the next stage or any public right of review (e.g., Part II Order or elevation request) can be exercised. Following the revision the MOE should consult widely on the guideline before finalizing, pages 79-80.	appropriate. A draft Code of Practice was posted on the *EBR* Registry.
Recommendation 14: ***Hearings, ADR, mediation***	**Issue:** Referral of certain individual EA applications to the ERT.	Pending the completion of the sectoral procedural framework, as an interim measure the Minister should ensure that there are public hearings before the ERT on individual EA applications where: a) ADR and mediation efforts have been employed; and, b) there is significant unresolved public controversy about substantive and procedural issues arising from the proposed undertaking, page 80.	There have been no referrals of EAs to the ERT since the Minister's Panel reported.
Recommendation 15: ***Integration***	**Issue**: Need to integrate PPS and EA.	The Minister should, as soon as reasonably possible, ensure the *EAA*: a) adopts by cross-reference the *Provincial Policy Statement* ("PPS") that is issued by Cabinet under section 3 of the *Planning Act*; b) specifies that all statutory decisions under the *EAA* shall be consistent with the PPS, as may be amended from time to time; and c) provides that, in cases of	There has been no further clarification of the relationship between the PPS and the *EAA*, (no clarification was provided in the March 1, 2005 PPS).

		conflict between the PPS and EA policies, the latter shall prevail, page 84.	
Recommendation 16: ***Integration*** *	**Issue**: Need for guidelines on harmonization of *CEAA* and *EAA*.	The MOE should develop, with proponent and EA participant input, clear and concise guidelines that explain when and how the *EAA* will be harmonized with *CEAA* in relation to undertakings that are potentially subject to both statutes, page 85.	A new document entitled "Federal/Provincial Environmental Assessment Coordination: A Guide for Proponents and the Public" came into effect in June 2007 following posting on the *EBR* Registry.
Recommendation 17: ***Integration***	**Issue**: Need to amend section 32 of the *EBR*.	The MOE should amend the general "EA exception" in section 32 of the *Environmental Bill of Rights* (*EBR*) to ensure that: a) public notice is provided under the *EBR* in relation to prescribed instruments that are proposed to implement environmentally significant projects or undertakings which have been approved or exempted under the *EAA*; and, b) residents may seek leave to appeal such instruments under the *EBR* only where the environmentally significant project or undertaking has been approved or exempted under the *EAA* without a public hearing, page 85.	No proposal has been made to amend the *EBR* as it apples to instruments under the *EAA*.
Recommendation 18: ***Class Environmental Assessment***	**Issue**: Need for mechanism to resolve issues during project planning under Class EAs or Electricity Projects Regulation.	As an interim measure while considering the recommended procedural reforms, the MOE should create an opportunity for the proponent and public, as well as the Minister, to make summary applications for interim directions (which could include mediation or rulings) from the Environmental Review Tribunal during the preparation of a project-specific Class EA/ESR or screening/review under	No interim measure has been proposed or implemented. Decisions on Class EA and sector process "bump up" and elevation requests are being delegated from the Minister to the Director.

		Electricity Projects Regulation 116/01, pages 90-91.	
Recommendation 19: ***Class environmental assessment***	**Issue:** Need for procedures to address 'bump-up' (Part II orders) and elevation requests.	The government should create a formal adjudicative process, administered by the ERT, to expeditiously hear and decide applications for "bump-ups" and elevation requests, page 91.	No such process has been made public.
Recommendation 20: ***Timelines***	**Issue**: Adequacy and enforcement of current timeframes and deadlines under certain regulations.	The MOE should review, with proponent and stakeholder input, the adequacy and enforcement of the current timeframes and deadlines within the Deadlines Regulation (O. Reg. 616/98), approved Class EAs, and the Electricity Projects Regulation (O. Reg. 116/01) and Guide, page 99.	The deadline regulation remains in place. There appears to be some response to public concern – the 2001 Electricity Guide requires a review period of 30 days following posting of a Notice of Completion, whereas the newer Waste Guide specifies a period of 60 days. The review period for ESRs in the 2007 Municipal Class EA is still 30 days.
Recommendation 21: ***Timelines***	**Issue**: Amendment to extend prescribed deadlines where warranted.	The MOE should develop, with proponent and stakeholder input, regulatory amendments that authorize the EAAB Director to extend prescribed deadlines where warranted, provided that: a) written notice of the extension, with reasons, is provided to the proponent and stakeholders; and b) the extension notice identifies a new final deadline for the making of the EA decision under consideration, pages 99-100.	No regulatory amendments have been proposed.
Recommendation 22: ***EA Website***	**Issue**: Transparency, clarity and timely access to information.	The MOE should establish a new EA website to include means to enable proponents and stakeholders to electronically track the status of the matter under consideration (i.e.	A new EA website is apparently under construction. The existing site continues to be limited in scope and functionality.

		government review, bump-up request, etc.) and to access information or supporting documentation about the matter, and other documentation relating to Ontario's EA program, page 100.	
Recommendation 23: ***Fees*** **	**Issue**: Need for fees to support EA program delivery and efficiency.	The *EAA* should be amended to authorize the making of regulations that prescribe fees (or the method for calculating fees) for certain matters under the Act. Fee revenue should be directed towards EA program delivery and efficiency. Page 104.	There has been no public announcement regarding regulations to prescribe fees for EAs.
Recommendation 24: ***Fees***	**Issue**: Development of fee schedule.	Once authorized to impose fees under the *EAA*, the MOE should develop, with proponent and stakeholder input, a regulation that establishes an appropriate fee schedule for EA actions including hearings. Such regulation should also govern the use, retention, payment or refund of prescribed fees, page 104.	There has been no public announcement regarding regulations to prescribe fees for EAs.
Recommendation 25: ***Fees***	**Issue**: Need for dedicated EA funding.	Application fees collected under the *EAA* should be used to fund or undertake specified EA-related activities, page 104.	There has been no public announcement regarding regulations to prescribe fees for EAs.
Recommendation 26: ***Monitoring and reporting***	**Issue**: Improving effects/effectiveness monitoring and reporting.	The MOE should, with public input, revise its draft EA compliance strategy, especially in relation to cumulative impacts. Among other things, the revisions should consider the following tools: a) third party audits; b) third party notification; c) electronic access to monitoring reports on proponent websites (or a new EA Registry to be established by MOE: see Recommendation 22); d) "model"	Although EA Branch has become more attentive to monitoring matters, there has been no formal public initiative in relation to monitoring requirements. There has been no public initiative to ensure consideration of cumulative effects or to require third party monitoring.

		monitoring/reporting provisions that can be imposed as conditions for approval in the context of individual EAs, Class EAs, declaration (exemption) orders, and other EA decisions; e) periodic review and/or revision of terms and conditions in instruments issued under the *EAA* to ensure they remain current, effective and enforceable, page 106.	
Recommendation 27: ***Monitoring and reporting***	**Issue**: Amendments to *EAA* re: powers and roles of provincial officers.	The MOE should, with public input, develop amendments to the *EAA* that: a) provide provincial officers with inspection and enforcement powers that are currently available under other environmental laws; b) increase fines to make them consistent with fine levels that are currently available under other environmental laws; c) empower the courts to impose innovative sentencing orders that are currently available under other environmental laws; d) impose a "reasonable care" duty upon corporate officers and directors to ensure compliance with the Act, regulations, or terms and conditions in EA approvals; and e) prescribe a two-year limitation period for the prosecution of offences under the *EAA*, page 106.	The EAA Branch now has a compliance officer. There has been no public statement of any intention to change the limitation period for prosecutions.
Recommendation 28: ***Monitoring and reporting***	**Issue**: Development of EA compliance programs and procedures.	The MOE should, with public input, develop EA compliance programs and procedures that include substantive guidance on: a) voluntary abatement and other measures to address	No specific compliance programs or procedures have been made public. Some provisions arising from EAs may be enforced through other

		relatively minor problems where the non-compliance poses no direct risk to the environment; b) mandatory abatement and other measures to address all other instances of non-compliance with the Act, regulations or terms and conditions in EA approvals; c) prosecutions to enforce EA obligations imposed by law; and. d) inspection protocols (i.e. frequency, follow up measures, MOE record-keeping, announced vs. unannounced visits, integration with MOE district work plan inspections, etc.), pages 106-107.	legislation e.g. *EPA, OWRA, Planning Act*. There may be a lack of public input to these provisions, however. Some types of project e.g. highways, hydro corridors may not require these approvals, so there would be more reliance on EA.
Recommendation 29: ***Monitoring and reporting***	**Issue**: Need for compliance training and education programs.	The MOE should ensure that the finalized EA compliance strategy is accompanied by appropriate training and educational programs for all MOE staff involved in EA monitoring, inspection and enforcement activities, page 107.	We have no knowledge of internal MOE training activities.
Recommendation 30: ***Monitoring and reporting***	**Issue**: Review/revise MOE administrative practices.	The MOE's current administrative practices/procedures should be reviewed and/or revised to ensure that they adequately reflect or integrate the essential elements of the finalized EA compliance strategy, page 107.	We have no knowledge of internal MOE practices / procedures on EA.
Recommendation 31: ***Monitoring and reporting***	**Issue**: Review/upgrade current EAIMS.	The MOE's current (Environmental Assessment Information Management Systems (EAIMS) should be reviewed and/or upgraded to ensure that it is electronically accessible by all MOE regional and district offices, page 107.	We have no knowledge of internal MOE information sharing.

Recommendation 32: ***Training***	**Issue**: Need for EA training and educational programs on cost-recovery basis.	The MOE should develop, with proponent and stakeholder input, appropriate EA training and educational programs under the *EAA*, and should recover the cost of developing and delivering EA training and educational programs by charging appropriate fees to participants in such programs. The MOE should ensure that EA training and educational programs are available to all Ontario government staff (including but not limited to MOE EAAB, Regional Office, and District Office staff) involved in the delivery of the province's EA program, pages 114-115.	MOE sponsors conferences but does not hold its own external training sessions. The Municipal Engineers Association has public training sessions on its Class EA.
Recommendation 33: ***EA Review Protocols***	**Issue**: Need for Cross-Ministry/Agency protocols.	The MOE should develop appropriate collaborative protocols with other provincial Ministries and agencies in order to ensure that government reviews under the *EAA* are undertaken by qualified persons in accordance with specified parameters and timeframes, page 115.	We have no knowledge on any such protocols.
Recommendation 34: ***Consolidated approvals***	**Issue:** Need to permit consolidated hearings of EA and other approvals.	The MOE should amend regulations under the *Consolidated Hearings Act* to facilitate one consolidated hearing for matters subject to EA and other approvals, (e.g., *Environmental Bill of Rights, Aggregate Resources Act, Ontario Water Resources Act*), page 119.	The regulations have not been amended. (*OWRA* is on the schedule to the *Consolidated Hearings Act*).
Recommendation 35: ***Relationship between EPA and EA***	**Issue**: Need to permit consolidated hearings of EA and *EPA* approvals.	The MOE should amend O. Regs. 206/97 and 207/97 to remove the automatic prohibition on *EPA* and *OWRA* hearings to ensure that:	No public action taken to date on this matter.

		(a) mandatory and/or discretionary hearings under the *EPA* and *OWRA* may be held in relation to waste disposal sites, waste management systems and sewage works which are subject to approval (or exempted) under the *EAA*, depending upon the environmental significance (i.e. risks and benefits) posed by such facilities; and (b) joint board hearings under the *EAA*, *EPA* and/or *OWRA* are available pursuant to the *Consolidated Hearings Act* where applicable, page 119.	
Recommendation 36: ***Refinements to the Electricity Projects Regulation and Guide***	**Issue**: Need to review and refine Electricity Projects Regulation and Guide.	The MOE should post a notice on the *EBR* Registry to solicit public comment on changes to the Electricity Projects Regulation and Guide proposed by section 5 of the Energy Table Report, page 122.	As noted above, the Electricity Regulation and Guide is under review (since approximately 2006), but no draft has been posted for consultation.
Recommendation 37: ***Refinement to Municipal Class EA***	**Issue**: Need to facilitate municipal transit projects.	In collaboration with the Municipal Engineers Association (MEA), the MOE should immediately initiate amendments to the MEA Class EA to include municipal transit projects, page 122.	A revised Municipal Class EA that incorporates municipal transit projects was approved in September 2007.
Recommendation 38: ***Research undertakings***	**Issue:** Need to review and revise research exemption category	The MOE should review and revise the "research" exemption under the *EAA* to include emerging green technologies, and to clearly define appropriate parameters on "research" undertakings (i.e. temporal limits or operational capacity), page 123.	There are no general parameters to our knowledge. The Plasco plasma arc waste thermal treatment pilot plant (City of Ottawa) was exempted by Regulation 253/06. The new waste Regulation and Guide exempts thermal treatment sites that would cease operation 12 months from waste first being received from Part II of the *EAA* (Guide Table 3).

RECOMMENDATIONS REQUIRING FURTHER CONSULTATION/REVIEW			
Recommendation 39: ***General Regulation***	**Issue:** Need to revise Regulation 334	The MOE should consider revising Regulation 334 in accordance with suggested changes found in Volume II, page 124.	Volume II has no Page 124. No revision has been made to Regulation 334.
Recommendation 40: ***Municipal EA community/advisory liaison committees***	**Issue:** Potential role for municipal EA community advisory committees in EA process.	The MOE should request that the advisory body consider the option of creating local or regional standing EA advisory and/or liaison committees, with a role in the EA development and review process (for projects subject to Class EAs as well as for individual EAs) within delineated study areas, page 125.	There is no advisory body, and to our knowledge there are no EA advisory/liaison committees, other than those established for specific projects.
Recommendation 41: ***Incorporating master plans into EA process***	**Issue:** Need to review relationship between master plans and EA process.	The MOE should request the advisory body to review the relationship between infrastructure master plans (e.g., transportation) and the EA process, page 126.	There is no advisory body, and to our knowledge there are no general master plan requirements. Municipal infrastructure master plans are addressed in the Municipal Class EA. Provincial transportation projects are identified through MTO's internal planning process.

SECTION 11

UNDECIDED PROPOSALS

SECTION 11: UNDECIDED PROPOSALS

As required by section 58 of the *EBR*, the ECO is required is produce a list of all proposal notices posted on the Environmental Registry between April 1, 2007 and March 31, 2008 that were not decided by March 31, 2008. A detailed list is available from the ECO by special request.

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C E O

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